Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

DORA GARCIA CISNEROS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this court should grant the petition, vacate the fifth circuit en banc opinion, and remand with instructions to the circuit court to reinstate the panel opinion so as to restore Petitioner's rights to seek appellate and certiorari review?

Whether this court may accept for certiorari review issues vacated by circuit court but pressed by Petitioner in the courts below?

Whether, in a prosecution under 18 U.S.C. § 1958, the government must prove more than foreseeability of either foreign travel or use of a foreign facility of commerce in order to establish the federal jurisdictional nexus and all of the elements of the offense beyond a reasonable doubt?

Whether, in a prosecution under 18 U.S.C. § 1058, the government must prove that the foreign travel or use of a foreign facility furthers or facilitates the offense of murder-for-hire in order to establish the federal jurisdictional nexus and all of the elements of the offense beyond a reasonable doubt?

Whether, in a prosecution under 18 U.S.C. § 1958, the government must prove that the foreign travel or use of a foreign facility did not occur merely as a product of happenstance in order to establish the federal jurisdictional nexus and all of the elements of the offense beyond a reasonable doubt?

Whether, in order to meet the statute of limitations for a prosecution under 18 U.S.C. § 1958, the government must indict the defendant within five years after the use

QUESTIONS PRESENTED – Continued

of the foreign facility that established the jurisdictional nexus and completed the elements of the offense?

INTERESTED PARTIES

1. Dora Garcia Cisneros, Petitioner.

2. Tony Canales, Petitioner's counsel at trial and on appeal.

3. David L. Botsford, Petitioner's counsel at trial and on appeal.

4. United States of America, Respondent.

5. James L. Turner, Respondent's counsel on appeal.

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OPINIONS BELOW

On October 27, 1993, Petitioner was indicted in the 357th Judicial District Court, Cameron County, Texas, for the capital murder of Albert "Joey" Fischer. The indictment also named Israel Olivares, Rafael Soto, Heriberto Pizana, Daniel Garza and Maria Martinez. Petitioner and Garza were tried together and convicted, with Petitioner receiving a life sentence, and Garza receiving a life sentence. Petitioner appealed and, on January 25, 1996, her conviction was reversed due to insufficient evidence. *Cisneros v. State*, 915 S.W.2d 217 (Tex. App. – Corpus Christi 1996), *pdr ref'd*, 935 S.W.2d 789 (Tex. Crim. App. 1996).

On February 23, 1998, Petitioner was indicted (along with a co-defendant, Ramon Palomares) in federal court for the offense of murder for hire, in violation of 18 U.S.C. § 1958. 1R577. The co-defendant, Palomares, was never apprehended. On May 12, 1998, Petitioner was convicted. 6R1-12R1616. On July 27, 1998, Petitioner was sentenced to life incarceration. 13R7. Notice of appeal was timely filed, 2R131.

The Fifth Circuit panel issued an opinion on October 28, 1999. *See United States v. Cisneros*, 194 F.3d 626 (5th Cir. 1999) [App. 1]. A motion for panel rehearing and a suggestion for rehearing *en banc* were timely filed. On February 3, 2000, the original panel opinion of October 28, 1999, was vacated and a new panel opinion issued. *See United States v. Cisneros*, 203 F.3d 333 (5th Cir. 2000) [App. 31]. Again, a motion for panel rehearing and a suggestion for rehearing *en banc* were timely filed.

Rehearing *en banc* was granted in Petitioner's case along with *United States v. Marek*, 198 F.3d 532 (5th Cir. 2000) and, thus, Petitioner's second panel opinion was vacated. *United States v. Cisneros*, 206 F.3d 448 (5th Cir. 2000) [App. 64]. The Court of Appeals, on its own motion, granted Petitioner leave to file a supplemental *en banc* brief, which was timely filed. *Id.* By consolidating Petitioner's case with *Marek*, the *en banc* Court indicated a

concern with a conflict of interpretation that had developed between the panel opinions in *Marek* and *Cisneros* over whether, in order to satisfy the jurisdictional element of 18 U.S.C. § 1958, a "facility" must be used in an *inter*-state fashion. The Court subsequently noted that this issue was only dicta in *Cisneros*. *United States v. Marek*, 238 F.3d 310, 313 (5th Cir. 2001) [App. 68]. In light of the vacatur of the panel opinions, Petitioner sought to preserve her statutory rights to appellate and certiorari review by re-briefing the issues that she pressed throughout her appeal, which are identical to the questions presented herein.

On January 4, 2001, the Court of Appeals issued its *en banc* opinion. *United States v. Marek*, 238 F.3d 310 (5th Cir. 2001) [App. 66]. The opinion addressed only the issue of conflict between *Marek* and *Cisneros*, and did nothing to restore those parts of any of the prior opinions in *Cisneros* that related to the issues that she actually had raised and repeatedly had sought to preserve for appellate review. The *en banc* Court also radically altered the facts of Petitioner's case in a manner at odds with the record and both panel opinions.

On January 15, 2001, Petitioner timely filed a Motion for Rehearing from the En Banc Opinion, on the grounds that: (1) the *en banc* opinion presented totally novel "undisputed facts," App. 70, that were materially incorrect and contrary to the evidence presented by the Government during its case-in-chief; and (2) the *en banc* Court only addressed one of the numerous issues on appeal, an issue in fact created by the Court's grant of *en banc* review, and thus denied Petitioner her right to appellate review of her issues and substantially impaired and impeded her ability to seek certiorari from this Court. Petitioner urged the Court of Appeals to grant rehearing *en banc* for factual correction and, then, either to address (*en banc* or panel) the issues in her supplemental *en banc* brief, or to reinstate those parts of the vacated second panel opinion that were not addressed in the *en banc* opinion, so that she might retain her right to a full and

fair appeal. Rehearing was denied and the second panel opinion was not reinstated. App. 104.

JURISDICTION

The Fifth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 1958

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than ten years or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

(b) As used in this section and section 1959 –

(1) "anything of pecuniary value" means anything of value in the form of money, a

negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1952.

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

18 U.S.C. § 3282

[N]o person shall be prosecuted for any offense . . . unless the indictment is found . . . within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

On February 23, 1998, a one count indictment was returned. It alleged that:

> "From in or about September 1992 to on or about April 6, 1993, in the Southern District of Texas and elsewhere and within the jurisdiction of the Court, the Defendants DORA GARCIA CISNEROS and RAMON PALOMARES did cause another to travel in foreign commerce and cause another to use a facility in foreign commerce, namely telephone communications facilities, with the intent that the murder of Albert Joseph (Joey) Fischer, Jr. be committed in violation of the laws of the State of Texas as consideration for a promise and agreement to pay, and the receipt of, $3,000 in United States currency. In violation of Title 18, United States Code, Section 1958 and Section 2."

The government's bill of particulars stated that:

> "The evidence in this case will show that, in regards to foreign travel, that Heriberto Pizana and/or other persons unknown travelled from Mexico to Brownsville, Texas, via an international bridge on or about March 2, 1993."
>
> * * *
>
> "The evidence in this case will show, in regards to use of telephone communications facilities in foreign commerce, that Daniel Garza used telephone facilities in San Fernando, Tamaulipas, Mexico, and in Matamoros, Tamaulipas, Mexico, to call Maria Martinez in Brownsville, Texas, from in or about November 1992 to in or about February 1993."

Accordingly, the indictment and bill of particulars only reflect two evidentiary bases to potentially sustain federal jurisdiction: (1) phone calls made from Mexico to Brownsville from Daniel Garza to Maria Martinez, Garza's "curandera" (i.e., the alleged go-between

between Garza and Cisneros); and (2) entry by an automobile from Matamoros, Mexico, to Brownsville, Texas.

The first and second panel opinions addressed the foreign telephone calls, mentioned the vehicle crossing, but avoided resolution of the automobile entry as a "more complicated issue." *See* App. 18; App. 50.

It was the government's position in at least one of four calls (11R1366) by Garza (who lived in San Antonio, Texas, 11R1355, 1400, 1419, but who had traveled to Mexico to see family members, 11R1402-1403, and harvest land, 11R1422) to Martinez from Mexico, Martinez initiated discussion of the alleged murder-for-hire.[1] Each of the four alleged calls from Mexico made by Garza to Martinez were for the purpose of receiving her advice about his own marital problems. 11R1367. During at least one of these four calls from Mexico, Martinez broached the topic of the "job" (paid assault), but Garza lied to her about having obtained someone to do it. 11R1368.

Subsequently, Garza met people in Brownsville who were part of the Cuellar crime gang (drugs and stolen vehicles), which was based in Dallas. Garza ultimately talked to them on or after February 14, 1993, in Dallas about doing the "hit" (11R1370) and after they agreed to do the "hit" when they would next travel from Dallas to Brownsville (11R1172-1174) and Garza purchased a pistol in Dallas and gave it to Victor Moreno, the "hit men" traveled from Dallas to Brownsville shortly before the "hit." 8R576. Even the government's opening statement admitted that the "hit-men" traveled from Dallas to Brownsville. 6R97.[2]

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[1] The government conceded in its post oral argument brief on limitations at page 4 that all four of these calls had occurred prior to February 14, 1993, more than five years before the return of the indictment.

[2] "Daniel Garza did look around for somebody and found some killers by the name of Israel Olivarez and Herbiberto Pizana, people who worked for Rudy Cuellar up in Dallas,

The government adduced uncontested evidence from Daniel Garza that he did not get them lined up to do the "hit" until he met with them in Dallas on or after February 14, 1993, 11R1370, and that they agreed to do the "hit" whenever they would next travel from Dallas to Brownsville, 11R1172-1174. Garza's testimony on these points corroborated the testimony of Victor Moreno, a member of the Cuellar gang who overheard conversations while he was in Dallas.

The "hit men" were alleged to be Heriberto Pizana, Israel Olivarez, and possibly Ramon Palomares. People identifying themselves as Pizana and Palomares (both of whom lived in Texas[3]) checked into La Quinta Inn in Brownsville, Texas, on March 2, 1993 at 8:26 p.m. and checked out on March 4, 1993 at 1:18 p.m. 10R1221. On their hotel registration they listed a vehicle license plate number. *Id.* The last three digits of the number were unclear – the record suggests they were either WEX or ME7, but the first four digits were "821T." *Id.* The make of the car was a white Grand Marquis, with border plates. *Id.*

In an effort to prove that this car had crossed the Mexican border into Brownsville on the night before the murder, the government elicited testimony from Customs Inspector Jorge Flores, that a vehicle with the license plate number "821THE7" crossed the Brownsville B&M bridge into Brownsville on March 3, 1993 at 6:39 p.m. 10R1254. The make and model of that car is unknown,

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Texas. . . . And you will hear from another person who worked for Rudy Cuellar, Victor Moreno, that Ramon Palomares came down with Israel Olivarez and Heriberto Pizana to kill that boy. . . . "

[3] Pizana was a resident alien, 10R1247, but he and Palomares were both residents of Texas. Indeed, Pizana's address during the relevant time frame was 106 Jackson, Brownsville, Texas, 10R1230, and Palomares' address was 601 King Road, San Juan, Texas. 10R1231. *See also* Govt. Exhibits 53 and 54.

although the car had a Tamaulipas, Mexico, plate. 10R1254. The facts adduced at trial concerning this car fail to prove that the two cars are one and the same. Although the two cars had similar license plate numbers, the record does not show that the numbers were the same, or even that they were the same make and model. Moreover, there was no evidence to show who drove the vehicle, who was present inside the vehicle, or why the vehicle was driven across the international bridge. According to Customs' log, the car noted by Customs had crossed the border 18 times between August 1992 and March 1993. 10R1256, Govt.Ex. 49. If this car was actually driven by the "hit men," which the record does not support, the travel on March 2 does not support the proposition that it was in furtherance of the murder for hire. Rather, it falls within a continuum of routine crossings, the purposes of which are entirely unknown.

The record supports no logical inference that anyone associated with this case went to Mexico in connection with the murder for hire. The murder weapon was purchased in Dallas on February 2, 1993. Although one of the "hit men" reportedly had a woman in his room at La Quinta on the night of March 2, it is conceivable that the men went to Mexico to pick up prostitutes, but such a purpose would have no connection to the murder. *See* 11R1379.

The evidence proved that Joey Fischer was murdered at approximately 8:00 a.m. on March 3, 1993. 11R1381.

Petitioner made timely motions for judgment of acquittal during the trial. Ultimately, the issue of jury instructions was reached by the district court. At the charge conference prior to closing arguments, Petitioner timely submitted to the court her proposed jury instructions. 11R1418, 1495. Cisneros' requested jury instructions nos. 12,[4]

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[4] Cisneros' requested instruction no. 12 stated, in relevant part:

> For you to find the defendant guilty of this crime, you must be convinced that the government had proved

12A, 13 and 14[5] all included language relating to whether the foreign telephone calls and/or the foreign travel had

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each of the following elements beyond a reasonable doubt:

> **FIRST ELEMENT:** That the defendant: (A) caused Heriberto Pizana to travel from Mexico to Brownsville on March 2, 1993, **in furtherance of the alleged murder-for-hire**; and/or (B) caused Daniel Garza to use a facility of foreign commerce to call Maria Martinez in Brownsville from San Fernando and Matamoros, Tamaulipas, Mexico between November 1992 and February 1993, **in furtherance of the alleged murder-for-hire** . . .

2R115 at 130-133 (emphasis in original).

[5] Cisneros' requested instruction no. 14 was a theory of defense instruction, which stated:

> The defendant's position is that she is not guilty of the offense of murder-for-hire. Her position is that she did not agree with Maria Martinez or anyone else, for that matter, to pay anyone to kill Albert Joseph "Joey" Fischer, Jr.
>
> It is also her position that the government has not proven beyond a reasonable doubt either (A) that she **caused** Heriberto Pizana to travel from Mexico to Brownsville on March 2, 1993, in furtherance of the alleged murder-for-hire; and/or (B) that she **caused** Daniel Garza to use a facility of foreign commerce to call Maria Martinez in Brownsville from San Fernando and Matamoros, Tamaulipas, Mexico between November 1992 and February 1993, in furtherance of the alleged murder-for-hire.
>
> Her position is that if Heriberto Pizana traveled in foreign commerce on March 2, 1993, it was not related to any scheme to murder Albert Joseph "Joey" Fischer, Jr., but rather related to his alleged criminal activities of stealing and transporting stolen vehicles and/or distributing drugs. Her position is further that if Daniel Garza called Maria Martinez in Brownsville from San Fernando and Matamoros,

to be "in furtherance" of the alleged murder-for-hire. These were denied, *see* 11R1502-20 (and subsequently, unsuccessfully reurged, 12R1599 both; 1600-1602; 1602-1607), and the district court did not instruct the jury that the alleged foreign telephone calls and/or alleged foreign travel had to be in furtherance or facilitate or even relate to the alleged murder-for-hire scheme.[6]

> Tamaulipas, Mexico between November 1992 and February 1993, any such calls were made by Daniel Garza to consult with Maria Martinez about whether his marital situation with his wife/ex-wife and family was changing and improving.
>
> Finally, it is her position that it is not her burden to prove who killed Joey Fischer or why Joey Fischer was killed because the law never imposed upon a defendant the burden of proving anything.

2R137-138 (emphasis added).

[6] The district court's instruction read:

> The Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce. . . . Now, "facility in foreign commerce" includes means of transportation and communication. Now, as part of the burden of proof, the Government does not have to prove that the defendant intended that foreign travel occur, or that foreign commerce facilities be used in connection with the murder, or even that the defendant knew that foreign travel occurred or would occur, or that foreign commerce facilities were or would be used. But the Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce.

1R93, 11R1516, 12R1593-1594. This language allowed the jury to convict Cisneros if "somebody . . . involved" traveled in or used a facility of foreign commerce regardless of the activity's connection to the murder. In fact, it affirmatively allowed the

Petitioner's requested jury instruction no. 15 addressed the fact that the indictment had to be returned within five years of the date of the alleged crime and that the government had the burden to prove every element of the offense had occurred within that five year period of time. The district court denied this requested instruction, *see* 11R1502-20, and did not instruct the jury on statute of limitations.

Cisneros' requested jury instruction no. 15A addressed "causation."[7] The district court denied this requested instruction, *see* 11R1502-20, and did not instruct the jury on causation.

The district court read its jury instructions on the afternoon of May 11, 1998. 11R1502-1519. On the morning of May 12, 1998, before final arguments to the jury, the district court received a note from one of the jurors asking for the court's instructions because the juror was not clear on what he or she must find before he or she could find Cisneros guilty. 12R1526. After final arguments, the district court favored the jury with a copy of what the court had read to the jury from.

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jury to convict even if the foreign commerce facilities were not used in connection with the murder, which constituted a constructive amendment of the indictment. *United States v. Holley*, 23 F.3d 902, 912 (5th Cir. 1994).

[7] This requested instruction read as follows:

> A person "causes" another to travel in foreign commerce or to use facilities in foreign commerce if he does an act with knowledge that the foreign travel or use of facilities in foreign commerce will follow in the ordinary course of business, or where such foreign travel or use of facilities in foreign commerce can reasonably be foreseen, even though not actually intended.

2R.140 The requested instruction was taken from *United States v. Sneed*, 63 F.3d 381 at 385 n.4 (5th Cir. 1995) (quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)).

Then, during deliberations, the jury sent out two notes seeking guidance on foreign commerce. *See* 11R1600-1610. Cisneros reurged the essence of her requested jury instructions relating to telling the jury that any foreign commerce (telephone calls or travel) had to be in furtherance of the murder for hire. These requests and objections to the failure to so instruct were all overruled by the district court. *Id.*[8]

SUMMARY OF THE ARGUMENT

The *en banc* Court's alteration of facts and refusal to reinstate parts of the vacated second panel opinion violated due process by denying Petitioner her rights to appeal (28 U.S.C. § 1291) and, possibly, to seek certiorari (28 U.S.C. § 1254(a)) on issues adversely decided against her. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Due process requires that, once a statutory right of appeal has been created, each defendant must be afforded "a fair opportunity to obtain an adjudication on the merits of his appeal." *Id.* at 405. Vacatur "render[s] an act void; as, to vacate . . . a judgment." BLACK'S LAW DICTIONARY. Vacatur of an issue on appeal may deny an appellant due process by stripping her of the initial appellate review and any further review of an adverse ruling on that issue. In the instant case, the *en banc* Fifth Circuit Court of Appeals may have made Petitioner's appealable issues, including legal sufficiency, disappear, denying her the panel's adjudication of those issues as well as any potential for certiorari on those issues. "Fair opportunity" for appeal is violated when the courts deny an appellant the "means to effectively press [her] appellate arguments." *Texaco v. Pennzoil*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987) (citing *Evitts* and *Douglas v. California*, 372 U.S. 353, 358 (1963)).

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[8] As noted by the panel, the jury was never instructed on the nexus requirement. App. 54 n.9. Additionally, the jury was never charged on causation.

This Court should grant review, vacate the Fifth Circuit *en banc* opinion as it relates to Petitioner, and remand the case with instructions that, since the *Marek en banc* decision did not address any of the material issues in Petitioner's case, the Fifth Circuit should reinstate the second *Cisneros* panel opinion, except as it addresses the issue taken up in the *en banc* opinion. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

In the alternative, 28 U.S.C. § 1254(a) states that this Court may review cases in the Courts of Appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree." The problem is that, as matters stand, there **never will be** an appellate judgment on the issues by the court below. This Court, however, many times has applied a "traditional rule" that certiorari review is precluded only when "the question presented was not pressed or passed upon below" in order to support a finding of jurisdiction on issues not briefed but passed upon by the Circuit Court. *See United States v. Williams*, 112 S. Ct. 1735, 1738-39 (1992). In *Williams*, this Court took special note that the rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon. . . . " *Id.* This rule, therefore, may permit certiorari review on issues pressed though not passed upon, as in the instant case. Out of excess of caution, Petitioner also presents the four substantive issues that, in her judgment, are certworthy and which were pressed repeatedly by her in the Court below.

REASONS FOR GRANTING THE PETITION

The *en banc* Court declared that Petitioner's second panel opinion was vacated. App. 68. Vacatur rendered the

judgment of the panel opinion void, leaving Petitioner with no decision by the appellate court on the issues therein, except the dicta through which Petitioner's case was joined to *Marek*. BLACK'S LAW DICTIONARY, *supra*; *Selvage v. Lynaugh*, 842 F.2d 89, 91-92 (5th Cir. 1988); *see Hooten v. Jenne*, 786 F.2d 692, 695 (5th Cir. 1986).

Justice requires (1) reinstatement of the issues in Petitioner's second panel opinion, other than the one addressed *en banc* and (2) correction of the facts in the *en banc* opinion. Title 28 U.S.C. § 2106 confers power on this Court to vacate the *en banc* decision, remand the case, and order "such further proceedings to be had as may be just under the circumstances." This "GVR" practice is "premised on matters" that this court has "reason to believe the court below did not fully consider." *Lawrence v. Chater*, 516 U.S. 163, 168 (1996). At the very least, GVR is required in the instant case because "clarification of the opinion below is needed to assure [this Court's] jurisdiction." *Id.* (quoting Scalia, J., dissenting in the same case).

A. By failing to reinstate parts of the second panel opinion, the *en banc* Fifth Circuit departed so far from its accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

The *en banc* Fifth Circuit's treatment of Petitioner's case is novel for the Circuit, which regularly, on *en banc* review, retains those parts of the underlying panel opinion with which it agrees. *See United States v. Brace*, 145 F.3d 247, 250 (5th Cir. 1998) (*en banc*); *United States v. Knox*, 120 F.3d 42, 43 (5th Cir. 1997); *Edwards v. City of Houston*, 78 F.3d 983, 989 n.5 (5th Cir. 1996) (*en banc*); *United States v. Greer*, 968 F.2d 433, 434 (5th Cir. 1992) (*en banc*); *United States v. Zuniga-Salinas*, 952 F.2d 876, 879 (5th Cir. 1992) (*en banc*); *In re Air Crash Disaster*, 821 F.2d 1147, 1169 (5th Cir. 1987) (*en banc*); *id.* at 1179 (Garza, J., concurring and dissenting); *Equilease Corp. v. Sampson*, 793 F.2d 598, 600 n.1 (5th Cir. 1986) (*en banc*); *Gibbons v.*

Crawford Fitting Co., 790 F.2d 1193, 1194 (5th Cir. 1986) (*en banc*); *Jenkins v. McDermott*, 742 F.2d 191, 192-93 (5th Cir. 1984) (panel); *Costello v. Wainwright*, 553 F.2d 506, 507 (5th Cir. 1977) (*en banc*).

B. By failing to reinstate parts of the second panel opinion, the *en banc* Fifth Circuit departed so far from other Circuits' accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

The *en banc* Court's treatment of Petitioner's case also is inconsistent with the practice of the other circuits. *Guidry v. Sheet Metal Workers Int'l*, 47 F.3d 681, 686 n.2 (10th Cir. 1994) (*en banc*); *Bunnell v. Sullivan*, 947 F.2d 341, 348 (9th Cir. 1991) (*en banc*); *Coalition for the Preservation of Hispanic Broadcasting v. F.C.C.*, 931 F.2d 73, 80 (D.C. Cir. 1991) (*en banc*); *In re Providence Journal Co.*, 820 F.2d 1354, 1354 (1st Cir. 1987).

C. By failing to reinstate parts of the second panel opinion, the *en banc* Fifth Circuit violated Petitioner's rights to due process.

The *en banc* Court's decision not to reinstate the second panel opinion deprived Petitioner of a fair opportunity to receive an adjudication of the merits of her appeal. *Evitts*, 469 U.S. at 405. The *en banc* Court's vacatur of issues it chose not to address rendered Petitioner's appeal to the panel a "meaningless ritual," denying her any means to effectively press her appellate arguments. *Id.* It is particularly unfair that Petitioner may have been forced by the *en banc* Court to acquiesce in a judgment that ignores the material issues she pressed in her case, potentially thwarting further review, and rewrites the facts in a manner contrary to the record in order to defeat her claims to legal insufficiency. *Bancorp*, 513 U.S. at 25.

The *en banc* opinion states the following regarding the facts of the offense:

> The relevant facts in *Cisneros* are also undisputed at this juncture. Doris [sic] Cisneros wanted to have her daughter's erstwhile boyfriend killed. Cisneros told this to her fortune teller and asked if the seer would find someone to commit the murder for a price. Acting as Cisneros' agent, the clairvoyant – through another client – ultimately located and employed two hit-men for Cisneros. In doing so the oracle placed and received international phone calls between Texas and Mexico. The hit-men traveled from Mexico to Brownsville, Texas, where they shot and killed Cisneros' intended victim. (footnote 10)
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> Footnote 10: The facts are set forth more fully in the panel opinion. *Cisneros*, 203 F.3d at 337-39.

App. 70. This part of the *en banc* opinion is totally contrary to the **"undisputed"** facts as presented by the government. There was uncontroverted evidence that: (1) the "hit men" traveled from Dallas to Brownsville; (2) the vehicle alleged to have crossed the border on the evening before the "hit" had crossed eighteen times in the prior eight months, and the government produced no evidence regarding who was in the vehicle when it crossed or why it crossed; (3) Martinez **did not "place" any call** to Garza or anyone else in Mexico that had anything to do with the offense; (4) all of Garza's calls to Martinez from Mexico were to talk to Martinez about Garza's marital problems; (5) in at least one of Garza's calls, Martinez asked whether Garza had located an assailant and he lied to her about it; and, finally (6) all calls placed by Garza to Martinez from Mexico occurred prior to February 14, 1993, when Garza finally talked to the "hit men" in Dallas and they committed to doing the job when they next travelled from Dallas to Brownsville. Neither panel opinion addressed whether the evidence of the crossing of the vehicle was sufficient for jurisdictional purposes and both panels implied that the "hit men" had traveled from Dallas to Brownsville.

The *en banc* opinion stripped Petitioner of appellate review. Due process requires that it be restored to her and that the facts of her case be rendered fairly and truthfully in accord with the record.

D. Assuming that Petitioner can seek certiorari review of the disposition of issues in a void opinion, this Court has jurisdiction over four key issues "pressed" by Petitioner in the court below.

Out of excess of caution, based upon *United States v. Williams*, 112 S. Ct. 1735, 1738-39 (1992), Petitioner presents four substantive issues that, in her judgment, are certworthy and which were repeatedly pressed by her in the courts below:

1. THE JURISDICTIONAL NEXUS, SUFFICIENCY, AND CAUSATION.

Section 1958 must be interpreted as requiring, if not intent, something more than "but-for causation" **and** "foreseeability." This interpretation also must be embodied within the jury instructions and sufficiency review (on motion for judgment of acquittal and on appeal) so that the due process mandates of *In re Winship*, 397 U.S. 358 (1970) and *United States v. Gaudlin*, 115 S. Ct. 2310 (1995), are not violated. The district court's jury instructions allowed the jury to convict Cisneros if "somebody . . . involved" traveled in or used a facility of foreign commerce **regardless of whether Cisneros caused** the travel in or use of a facility of foreign commerce. 1R93; 11R1516; 12R1593-1594. This instruction diluted the government's burden of proof and constituted a constructive amendment of the indictment/bill of particulars by failing to limit the travel and/or use of a facility of foreign commerce, as well as not requiring that the travel or use of a facility of foreign commerce be in furtherance of or facilitated the alleged murder-for-hire scheme and not merely be the product of happenstance.

a. The Panel Opinion on Rehearing has decided an important federal question in a way that conflicts with relevant decisions by this Court by reducing the interstate commerce nexus to a but-for causation requirement.

The Fifth Circuit panel concluded that *United States v. Edelman*, 873 F.2d 791 (5th Cir. 1989), governed and only required the government to prove "simple 'but for' causation rather than foreseeability" in order to establish the causation aspect of the foreign commerce requirement in § 1958(a). App. 15, 16, 46. This interpretation of *Edelman* misapplies a conspiracy case to a straightforward murder-for-hire case and is prohibited by *Rewis v. United States*, 401 U.S. 808 (1971).

Reviewing 18 U.S.C. § 1958 in light of 18 U.S.C. § 1952 (the Travel Act) is appropriate. *Edelman*, 873 F.2d at 794. This Court's decision in *Rewis* defines the parameters of the nexus between the interstate/foreign commerce and the underlying offense for purposes of the Travel Act and, by extension, the murder-for-hire statute, by interpreting Congressional intent through the rule of lenity. 401 U.S. at 811-12. This Court held in *Rewis* that reading "foreseeability" into the statute violated Congressional intent by making it too easy for the government to establish a nexus. *Id.* at 813. "Congress" provided "little, if any, evidence that [it] intended that foreseeability should govern criminal liability under § 1952." *Id.* at 813. For the sake of comity, Congress intended that the proof demonstrate, if not intent, something more than "but-for causation" **and** "foreseeability" in order to prevent expansive interpretation of the interstate/foreign nexus that would swallow up state law offenses and state jurisdiction.

The panel's "but-for causation" rule violates the principle oft-repeated throughout this Court's commerce clause jurisprudence, in addition to *Rewis*, that Congress may not create a jurisdictional "element," such as the interstate/foreign commerce nexus in §§ 1952 and 1958,

that does not meaningfully limit federal power, **especially** "in areas such as criminal law enforcement . . . where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 561, 564 (1995). By creating its "but-for causation" model, the *Cisneros* panel, in the words of Judge Learned Hand, formed "a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *Lopez*, 514 U.S. at 567 (quoting cases). This is particularly egregious in light of the fact that this was an intrastate offense that the government attempted to transform into a federal offense (as demonstrated by the fact that Cisneros was previously acquitted in state court for the substantive offense of the murder of Fischer).

b. The Panel Opinion on Rehearing has entered a decision that conflicts with the decisions of other United States courts of appeals by rejecting the need to find whether the defendant intentionally or knowingly caused the travel or use of an interstate facility.

Every Section 1952, 1952A, and 1958 case of which counsel is aware in which the defendant was directly charged, as opposed to charged as a coconspirator or aider and abettor,[9] makes explicit or implicit findings

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[9] *Edelman*'s treatment of causation would apply to Cisneros' case only if she had been charged with conspiracy. Like *Edelman*, *United States v. Perrin*, 580 F.2d 730 (5th Cir. 1978), and *United States v. Razo-Leora*, 961 F.2d 1140 (5th Cir. 1992) are inapplicable to Cisneros' case to the extent that they also are based upon conspiracy charges and convictions. Because the *Edelman* jury was charged with conspiracy, it could automatically find Edelman **vicariously liable** for the act of coconspirator Young sending a letter through the mail to Zabitosky. *Edelman*, 873 F.2d at 792. This cannot be said of Garza and Martinez, because the jury was not charged with finding

regarding whether the ***defendant intentionally or knowingly***[10] ***caused*** the travel or use of interstate facility. This involves the defendant herself travelling, using the facility, or an agent travelling or using the facility under the defendant's direction, and at least with her knowledge that the interstate facility is being used to further the offense. *See, e.g., United States v. Finley*, 175 F.3d 645, 646 (8th Cir. 1999) (defendant personally put stamps on letters that were mailed)); *United States v. Weathers*, 169 F.3d 336, 344 (6th Cir. 1999) (defendant's numerous cell-phone conversations); *United States v. Garrett*, 716 F.2d 257, 265 (5th Cir. 1983) (defendant instructed codefendant to make an interstate phone call); *United States v. Pecora*, 693 F.2d 421, 424 (5th Cir. 1982) (phone call by defendant in Georgia to sheriff in Louisiana); *United States v. Jones*, 642 F.2d 909 (5th Cir. 1981) (defendant travelled between states to cash wagering checks); *United States v. Perrin*, 580 F.2d 730; 735 (5th Cir. 1978) (defendant, on instructions from co-defendants, made interstate telephone calls); *United States v. Archer*, 486 F.2d 670, 683 (2d Cir. 1973) (defendant's *receipt* of a phone call from Paris, France, in no way initiated by the defendant, although expected by him, was insufficient to establish nexus); *United States v. Kahn*, 472 F.2d 272, 285 (2d Cir. 1973) (finding nexus based upon

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that they were coconspirators with Appellant. Without the conspiracy charge, their actions had to be more substantially tied to Appellant than through her possible foresight of those actions.

[10] The cases rely upon "intent" or "knowledge" to establish the jurisdictional nexus. The point, however, is that something more than foreseeability is required and the jury must be charged with finding something more than foreseeability. Otherwise, a conviction can be obtained without any jury finding that the defendant actually caused the foreign commerce, which would run afoul of this Court's pronouncement in *United States v. Gaudlin*, 115 S. Ct. 2310 (1995), that the jury must find every element of the offense beyond a reasonable doubt.

extensive interstate travel and use of mails, distinguishing *Rewis* on basis that defendants there did not engage in interstate activities themselves and interstate travel was marginal or unforeseen). In *Marek*, for example, Marek personally delivered $500 to Western Union in Houston for transfer to the undercover agent in Harlingen. *Marek*, 198 F.3d 532 (5th Cir. 1999).

2. THE JURISDICTIONAL NEXUS, SUFFICIENCY, AND "FURTHERANCE."

A discussion about a murder-for-hire scheme does not necessarily "make easier" the carrying out of that scheme. The government did not prove that Martinez's references, in the alleged international calls, to Garza's alleged past promise to find a hit man and Garza's lies to Martinez about finding him in any way advanced, facilitated, or otherwise furthered the criminal scheme. To the contrary, Garza testified that he lied about finding hit men. 11R1365, 1368. Garza testified that the very few alleged international calls to Martinez were among numerous calls he made to her from within the United States (Brownsville and San Antonio), charged on credit and to Garza's home number. 11R1364, 1399-1400. Garza testified that he called "daily" from roughly October 1992 to March 1993 and that he was in the "habit" of going to see Martinez once or twice a month. 11R1363, 11R1399.

The four alleged calls from Mexico are rendered virtually insignificant in light of the large number of other engagements Martinez had with Garza in person and over the phone while Garza was in Brownsville or San Antonio. And, given the fact that the only evidence about dates of these four international calls is that they occurred prior to February 14, 1993, there is a dearth of evidence to support the conclusion that a rational trier of fact could have concluded beyond a reasonable doubt that they furthered or facilitated the murder-for-hire scheme.

Absent the jury instruction requested by Petitioner, the jury was not allowed to determine whether the foreign telephone calls, if any, furthered, facilitated or made easier the alleged murder-for-hire scheme. As such, Petitioner was convicted without a jury finding on this essential element of the offense, a due process violation. *See e.g., In re Winship, supra* and *United States v. Gaudlin, supra.*

a. The Panel Opinion on Rehearing has decided an important federal question in a way that conflicts with relevant decisions by this Court by making a distinction between "facilitation" and "furtherance."

While the panel on rehearing agreed that the statute required the foreign commerce to "facilitate" the underlying offense or "make it easier," App. 49, the panel rejected Petitioner's evidentiary insufficiency challenge, *id.*, and found that her requested instruction was incorrect because it used the term "in furtherance" of the murder-for-hire scheme (as opposed to "facilitated"). App. 54.

The panel erred in suggesting the existence of a meaningful legal difference between the terms "facilitate" and "furtherance" for interpretation of the Travel Act and murder-for-hire statutes. This Court and the Fifth Circuit have used the terms interchangeably in cases dealing with Travel Act prosecutions. *See, e.g., Erlenbaugh v. United States,* 409 U.S. 239, 247 (1972) ("furtherance"); *Rewis v. United States,* 401 U.S. 808, 813 (1971) ("furtherance"); *Presley, supra* ("furtherance"); *United States v. Roberson,* 6 F.3d 1088, 1094 (5th Cir. 1993) ("facilitate"). The use of the term "facilitate" in the cases cited by the panel (App. 49-50 n.7) merely follows the statutory language in 18 U.S.C. § 1952. *See United States v. Perrin,* 580 F.2d 730, 736 (5th Cir. 1978) ("[I]t is enough that

the . . . use of interstate facilities makes easier or facilitates the unlawful activity.").

b. The Panel Opinion on Rehearing expressly conflicts with the decisions of other courts of appeals on the question whether the use of the facility in interstate commerce must be "in furtherance" of the underlying murder scheme.

The Fifth Circuit second panel opinion expressly recognized a conflict between Petitioner's case and *United States v. Houlihan*, 92 F.3d 1271, 1292 (1st Cir. 1996), wherein the First Circuit "required the use of the facility in interstate commerce to be 'in furtherance' of the underlying murder scheme." App. 48-49.

The panel's finding that the Fifth Circuit itself only requires a showing that the use of the facility "facilitated" the underlying crime, i.e., "made it easier," also is inconsistent with other Fifth Circuit opinions. *United States v. Presley*, 478 F.2d 163, 168 (5th Cir. 1973) (reversing district court's denial of motions to withdraw nolo contendere pleas following *Rewis*, on finding that facts had not been developed regarding the "extent and significance of the crossing of state lines to the furtherance of the operations of [an] illegal gambling casino"); *United States v. Gooding*, 473 F.2d 425, 427-28 (5th Cir. 1973) ("The Travel Act does not proscribe all interstate travel which may incidentally lead to a furthering of unlawful activity.") (citing *United States v. Hawthorne*, 356 F.2d 740 (4th Cir. 1966)).

3. THE JURISDICTIONAL NEXUS, SUFFICIENCY, AND HAPPENSTANCE.

In light of the purely intrastate nature of the offense, the incidental calls from Mexico do not meet the government's burden of proof nor the requirement for jurisdiction. The evidence of the four alleged international calls from Garza to Martinez prior to February 14, 1993, was insufficient and the denial of Petitioner's requested jury instructions 12, 12A, 13

and 14 (and the district court's overruling of Petitioner's objections to the failure to give them) constitute harmful reversible error.[11]

a. The Panel Opinion on Rehearing decides an important federal question in conflict with relevant decisions of this Court by holding that alleged use of a foreign facility of commerce by happenstance may establish a nexus for the alleged murder-for-hire scheme.

The panel implicitly held that the government met its burden to prove a connection between the use of foreign facilities of commerce and the offense with evidence of only "fortuitous and incidental" foreign contacts. App. 49-50 n.7 (citing *United States v. Pecora*, 693 F.2d 421, 424 (5th Cir. 1982)); App. 53-54.[12]

This holding, based on a few "incidental" foreign contacts among a vast number of domestic contacts, is not sustainable in light of *Rewis*. This Court held in *Rewis*, 401 U.S. at 812, that jurisdiction could not be created under the Travel Act by geographical events which occurred through "happenstance." *Rewis*, thus, conflicts with the panel's holding on rehearing and the *Pecora* panel's holding.[13]

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[11] Under *In re Winship*, *supra* and *United States v. Gaudlin*, *supra*, Cisneros has been convicted without a jury finding on this essential element of the offense, which constitutes a due process violation.

[12] If it were otherwise, the panel could not have found, as it did, that "the use of the telephone across national boundaries was purely incidental" without also granting Cisneros relief on her sufficiency and instructional error claims pointing out the government's duty to prove that the calls were "in furtherance" of the offense. App. 54.

[13] Another panel of the Fifth Circuit held in *Pecora*: "[W]e discern in the Travel Act no exception for casual and incidental occurrences or for 'happenstance' ones." 693 F.2d at 424.

b. The Panel Opinion on Rehearing conflicts with decisions of other courts of appeals by holding that alleged use of a foreign facility of commerce through happenstance may establish a nexus for the alleged murder-for-hire scheme.

By holding that incidental contact can satisfy the nexus, the panel's opinion and *Pecora* are inconsistent with *Presley* and *Gooding, supra,* the Fifth Circuit's own precedent. No matter whether the alleged foreign phone calls "made easier" the unlawful activity in this case, the Commerce Clause required more of a nexus than phone calls which "served no purpose that" was not in fact "equally served by" a large number of in-state calls. *United States v. Archer,* 486 F.2d 670, 683 (2d Cir. 1973); *see also Rewis,* 401 U.S. at 812; *United States v. O'Dell,* 671 F.2d 191 (6th Cir. 1982); *United States v. McCormick,* 442 F.2d 316 (7th Cir. 1971); *United States v. Judkins,* 428 F.2d 333 (6th Cir. 1970).

4. THE JURISDICTIONAL NEXUS, SUFFICIENCY, AND PROOF OF ELEMENTS WITHIN THE STATUTE OF LIMITATIONS PERIOD.

The statute of limitations in 18 U.S.C. § 3282 required the government to secure an indictment within five years of the commission of the alleged murder-for-hire offense. *United States v. Edwards,* 968 F.2d 1148, 1153 (11th Cir. 1992). The government failed to prove that the offense occurred within the limitations period. Once conflicting evidence has been presented relevant to whether the government has complied with the limitations period, the question of whether the government instituted the prosecution in a timely manner becomes an issue for the jury to determine. *Id.* It was reversible error for the district court "to refuse to charge on a defense theory for which there [was] an evidentiary foundation and which, if believed by the jury, would [have been] legally sufficient

to render [Appellant] innocent." *Id.* (quoting *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir. 1979)).

a. The Panel Opinion on Rehearing has decided an important question of federal law that should be settled by this Court by finding murder-for-hire to be a continuing offense in order to avoid the government's failure to prove all of the elements of the offense within the statute of limitations period.

As the panel recognized, the time period for prosecution begins to run when the crime is complete. App. 57 (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)). "Virtually all jurisdictions provide that the period of limitation begins to run with the commission of the crime, that is, when every element in the statutory definition of the offense has occurred." 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 18.5(a) (1999). The elements of murder-for-hire in 18 U.S.C. § 1958 are:

> (a) traveling or causing another to travel in interstate or foreign commerce, or using or causing another to use the mail or other facility of interstate or foreign commerce; (2) with intent that a murder be committed in violation of the laws of any State or the United States; and (3) as consideration for the receipt of pecuniary value.

United States v. Sharpe, 193 F.3d 852, 863 n.6 (5th Cir. 1999). "On its face, [§ 1958] allows a conviction if the government proves that a defendant traveled in interstate commerce with the intent that a contract murder be committed." *United States v. Ransbottom*, 914 F.2d 743, 746 (6th Cir. 1990). On its face, § 1958 also allows conviction if the government proves a defendant caused another to use a facility of foreign commerce in order to facilitate a murder solicited by her promise of remuneration. *United States v. Sanchez*, 3 F.3d 366, 367 (11th Cir. 1993).

If the other elements are satisfied, the crime occurs at the moment of foreign or interstate movement or use of interstate or foreign facilities. Neither actual murder nor remuneration are necessary to prove all of the elements of the offense.[14] Therefore, there is neither express indication in the statutory language nor a conclusion necessarily arising from the nature of the substantive offense, that § 1958 was intended to be a continuing offense. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (requiring one or the other for an offense to be "continuing").

b. The Panel Opinion on Rehearing conflicts with decisions by other United States Courts of Appeals by finding murder-for-hire to be a continuing offense in order to avoid the government's failure to prove all of the elements of the offense within the statute of limitations period.

The panel opinion conflicts with other circuit court decisions that find the crime to be complete with the use of interstate commerce facilities. *United States v. Finley*, 175 F.3d 645, 647 (8th Cir. 1999) (holding the murder-for-hire offense complete when letters furthering the offense had been mailed, including one promising earnest money); *United States v. Delpit*, 94 F.3d 1134 (8th Cir. 1996) (holding that once the interstate facility is used with the

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[14] Thus, actual "receipt of pecuniary value" only completes the crime when it occurs simultaneously with satisfaction of the interstate nexus. App. 57 n.12. Of course, the panel's holding would be "consistent" with *United States v. Thompson*, 130 F.3d 676 (5th Cir.), *cert. denied*, 118 S. Ct. 2307 (1998), where "payment occurred simultaneously with use of the facility in interstate commerce." *Id.* That is the **only** circumstance with which the panel's holding would be consistent. The problem is that the panel's holding is erroneous because, according to the government's proof, a promise to pay had been made prior to Garza's alleged, first call from Mexico to Martinez in Texas.

required intent, the crime of interstate murder-for-hire is complete); *United States v. Davidson*, 122 F.3d 531, 535 (8th Cir. 1997) ("Section 1958 . . . outlaws causing travel or the use of interstate commerce facilities with the intent that murder-for-hire be committed."); *United States v. Brockdorff*, 992 F. Supp. 22, 24 (D. D.C. 1997) (applying *Delpit*); and *United States v. Superson*, 1997 WL 223072, at *1 (N.D. Ill. 1997) (unpublished Memorandum Opinion and Order).

Congressional intent undergirds the other circuits' opinions. "The **gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent** and the offense is complete whether or not the murder is carried out or even attempted." S. REP. NO. 225, 98TH CONG., 1ST SESS. 1983, at 306 (emphasis added). The Senate Record explains the provision that has become § 1958 as follows:

> Section 1952A would reach the travel in interstate or foreign commerce or the use of the mails or a facility in interstate or foreign commerce (such as a telephone if used for an interstate call) with the intent that a murder be committed in violation of state or Federal law. The murder must be planned or carried out as consideration for the receipt of something of pecuniary value or a promise or agreement to pay something of pecuniary value.

129 CONG. REC. 5600 (March 16, 1983). The Senate Record demonstrates that the focus of Congress' effort was to criminalize the travel in or use of foreign facilities in furtherance of a murder-for-hire scheme. The jurisdictional nexus, with mens rea, is the substantive federal offense. The description of murder-for-hire in the Congressional Record, focussing on the moment of travel or use, should dispel any notions that it is only complete

upon actual receipt of payment or that it is some kind of "continuing offense."[15]

The conjunctive wording of Cisneros' indictment ("**and** the receipt of") does not obviate the fact that the offense would have been complete whenever Garza made his first phone call from Mexico during which Martinez asked about a hit man (assuming, for purposes of argument only, that the call was in furtherance of or facilitated the murder-for-hire scheme). All of Garza's alleged calls from Mexico occurred prior to February 14, 1993, which the government conceded to be accurate in its post oral argument submission at page 3, yet the indictment was not returned until February 23, 1998. The government does not have the option to "charge and try" a case in any way it desires if the offense, in fact, *cannot be charged* because the statute of limitations has already run. App. 58 n.13.

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[15] Congress obviously intended murder-for-hire to boil down to travel or use of interstate or foreign commerce facilities with intent. The offense does not correspond to "continuing offenses" for which the limitations period "begins to run only when [a] course of conduct . . . terminates." LaFave, Israel, & King, *supra*, at § 18.5(a) (finding as "continuing offenses" concealment of assets, possession-of-contraband crimes, falsification schemes which continue to produce fruits, and conspiracy (for which counting begins with the last overt act in furtherance of the conspiracy)). Cisneros was not charged with conspiracy to commit a murder for hire, but rather the substantive offense.

In *United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir. 1975), there was no statute of limitations problem, as noted by the panel, App. 58 n.13, where the mailings in furtherance of a mail fraud scheme occurred within the limitations period. The government in *Ashdown* proved a crime that was not complete until the mails were used. The problem for the government in Cisneros' case is that precisely the opposite occurred. The government **failed to prove** that the use of the foreign facilities, required to complete the crime, occurred within five years prior to the indictment.

Had the jury been properly instructed in Cisneros' case regarding the statute of limitations, it would have found that the government failed to prove that the alleged foreign phone calls made by Daniel Garza to Maria Martinez occurred on or after February 23, 1993, and thus inside the limitations period. *Id.* The district court committed reversible, harmful error by failing to submit Petitioner's requested instruction 15. The panel thus erred by holding that the instruction was not necessary and also erred by not finding that the evidence was insufficient as a matter of law because the alleged foreign calls from Garza to Martinez all occurred more than five years prior to the return of Cisneros' indictment. Accordingly, the *en banc* Court should have entered a judgment of acquittal as to the foreign telephone calls and remanded the case for a new trial limited to the alleged foreign travel and/or ordered a new trial due to the instructional error.

CONCLUSION

Petitioner respectfully requests that this Court grant this petition and: (1) vacate the Fifth Circuit's *en banc* opinion, and remand with instructions to the *en banc* Court to amend its *en banc* opinion to reinstate those parts of the second panel opinion that are not altered by the *en banc* ruling, in order to protect Petitioner's rights to appeal and certiorari review, and to amend the factual findings in the *en banc* and panel opinions in accord with fundamental fairness; or (2) accept those issues from the second panel opinion raised herein.

Respectfully submitted,

DAVID L. BOTSFORD

App. 1

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Dora Garcia CISNEROS, Defendant-Appellant.

No. 98-40955.

Oct. 28, 1999.

James Lee Turner (argued), Paula Camille Offenhauser, Assistant U.S. Attorney, Houston, TX, for Plaintiff-Appellee.

David L. Botsford (argued), Austin, TX, J.A. Canales, Jo Ellen Hewins, Canales & Simonson, Corpus Christi, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, JOLLY and DUHE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Joey Fischer, a high school student, was murdered in cold blood by a hired killer – a killer hired by the mother of an erstwhile girlfriend.

Fischer and Christina Cisneros ("Christina"), were in high school in Brownsville, a Texas border town. They began dating in the spring of 1992. But Fischer ended the courtship after only several weeks to the bitter disappointment of the Cisneros family.

Dora Cisneros ("Cisneros"), Christina's mother, first tried to persuade Fischer to change his mind. Fischer was not interested. When this did not work, Cisneros went to a fortune teller named Maria Martinez to find out

whether Fischer was destined to marry Christina. The tarot cards did not hold the answer she wanted, so Cisneros told Martinez to put a curse on the young man.

Near the end of October, Cisneros turned to a more mundane solution: she asked Martinez to find someone to beat up Fischer. By winter, Cisneros had decided to have him murdered instead.

Now enter Daniel Garza. Garza had also been unlucky at love. He and his wife separated in the spring of 1992. Soon afterwards, he came to Martinez, asking what he might do to rekindle the fire of romance with his wife. During one of their meetings in October 1992, Martinez's thoughts reverted to the lost romance of the scorned Christina. She asked Garza about finding someone to rough up Fischer. In late January or early February, however, Martinez upped the ante with Garza: she relayed that "the client" wanted the boy killed.

Though Garza assured Martinez that he would find someone for the job, he was more immediately concerned with rejuvenating his own fast-fading love life. In the ensuing weeks, he frequently called Martinez to discuss schemes to get his wife to return. In the meantime, however, Martinez, was under almost daily pressure from Cisneros for news on the planned retribution against Fischer. Feeling the pressure, Martinez would interrupt Garza during their conversations to find out if he had found someone to kill Fischer. Garza lied several times and said he had found someone to commit the crime. The two would then discuss the murder before returning to the subject of a plan to plant the stirrings of love in the heart of Garza's wife.

There is an important – a highly important – question about where Garza placed these calls. At trial, he testified that he made at least four calls from two Mexican towns, San Fernando and Matamoros. He said that he had placed them in "casetas," booths where a caller pays for the call after making it. During cross-examination, however, defense counsel asked him why an FBI report from his interview with an agent said that he had made the calls collect. Garza testified that the agent was mistaken. Garza went on to explain that collect calls from Mexico were difficult, though he may have made one of them to Martinez. In its case-in-chief, the defense tried to show that no calls were made from Mexico. FBI Agent David Church was called as a defense witness. He testified that while Garza had told him that all the calls were collect, Martinez's phone records did not show any such calls.

In early February 1993, Garza found the men to kill Fischer: Israel Olivarez and Heriberto "Eddie" Pizana. He met them in Brownsville, at the home of Olivarez's uncle. Like Garza, they worked for Rudy Cuellar in a drug smuggling and auto theft operation stretching from Mexico to Chicago. Olivarez and Pizana were car thieves and hit men for the organization. Garza met with the two again in Dallas on February 14 to explain what he wanted. Olivarez said that they would commit the crime the next time they were in Brownsville. Garza gave them a photo of Fischer and a map to his house.

On the afternoon of March 2, Garza was returning from San Fernando, Mexico, to San Antonio, Texas. He stopped at the La Quinta Inn in Brownsville, where he happened to find Olivarez. Olivarez told him that "he was ready to do the job."

We now turn to a development of uncertain connection to the hired killers, but one that we must mention. At 6:39 that evening, a car crossed into the United States from Mexico at the Brownsville point of entry. Border authorities recorded its Mexican license plate number as "821 THE7." A vehicle with that plate had crossed the border eighteen times between August 1992 and March 1993. At 8:26 p.m., Pizana and Ramon Palomares, another Cuellar hit man, checked into the La Quinta Inn. The receptionist registered their car as a white Grand Marquis with Mexican plates. Her handwriting made it hard to decipher whether the plate number was "821 TWEX" or "821 THE7."

We now come to the implementation of this insane and tragic scheme. A little after 7:00 a.m. on March 3, Fischer was shot and killed in his driveway. The physical evidence consisted of a bail bondsman's business card found next to the body and a tennis shoeprint on the outside air conditioning unit. The only other clue to the killer's identity was a witness who remembered passing a four-door white car with Mexican plates driving in the vicinity of Fischer's house near the time of the murder. The witness described the man in the car as Hispanic, twenty-three to twenty-five years old, with a short beard.

Then the conspirators spread the news that the deed was done. Between 7:00 and 8:00 the morning of the murder, Olivarez called Garza to tell him that Fischer was dead. Garza immediately relayed this news to Martinez, who said that she could not get the money from her client without proof of the murder. Garza then discussed the situation with Olivarez at the La Quinta Inn. Pizana was also in the room, but not Palomares. After the discussion,

Pizana and Garza visited Martinez, who gave them the money. When the two returned to the La Quinta, Garza tried to give Pizana the money, but he declined and told Garza to give it directly to Olivarez. Garza did that and noticed before leaving that Olivarez and Pizana had two white vehicles: a white pickup truck with a black stripe and a white Ford.

Fortunately, the bondsman's business card had handwriting on the back, and it matched Cuellar's handwritten bond application. They also began pursuing information on Cuellar's associates, Pizana, Olivarez, and Ramiro Moya. They learned about Garza through Moya, Garza's brother.

Garza became the key that opened the gate through which other conspirators were herded. He agreed to set up a meeting with Martinez and to wear a wire. He called her twice to tell her that the gunmen wanted more money, and each time she gave it to him. The police then arrested Martinez and had her wear a wire for a meeting with Cisneros. They arrested Cisneros in her car as she was giving Martinez $500.

At trial, testimony by a person working for Cuellar, Victor Moreno, helped establish the link between Cuellar and the murder. Moreno testified that he heard about the Fischer murder within the Cuellar organization. He had also been with Cuellar when Palomares phoned Cuellar to report the murder of "a boy" in Brownsville.

Cisneros and her accomplices were convicted in state court for capital murder. The Texas appellate court overturned the conviction, however, for insufficiency of evidence linking her to the murder. The state then turned the

case over to federal prosecutors, who charged Cisneros under the federal murder-for-hire statute, 18 U.S.C. § 1958. She was convicted in May 1998. The district court then denied her motion for judgment notwithstanding the verdict and for a new trial. Cisneros has now appealed, citing seven different instances of insufficient evidence and error.

I

A

The first, and most complex, issue that this case presents is whether there is sufficient evidence to show that Cisneros met the interstate/foreign commerce requirement for a federal murder-for-hire conviction. In 1993,[1] the relevant parts of the statute read:

> (a) *Whoever* travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or *uses or causes another* (including the intended victim) *to use* the mail or *any facility in* interstate or *foreign commerce, with intent that a murder be committed* in violation of the laws of any State or the United States *as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value,* shall be fined not more than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined not more than $20,000 and

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[1] The murder occurred in 1993. In 1994, the statute was amended to allow for capital punishment when death resulted from a murder-for-hire. Pub.L. 103-322, § 60003(a)(11), 108 Stat.1969, 2033 (1994).

> imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.
>
> (b) *As used in this section and section 1959 . . .*
>
> (2) *"facility of interstate commerce"* includes means of transportation and communication.

18 U.S.C. § 1958 (emphasis added). The government asserts that it proved this interstate/foreign commerce requirement in two ways, either of which was sufficient. First, Garza's phone calls from Mexico to Martinez in Brownsville qualify as use of a "facility in interstate or foreign commerce" caused by Cisneros. Second, the matching license plate numbers from the vehicle that crossed into the United States from Mexico and was later registered at the La Quinta Inn to Pizana and Palomares, combined with the sighting of a white vehicle near the scene of the crime, demonstrates that Cisneros caused another to travel in foreign commerce.

B

To determine whether the government presented evidence sufficient to satisfy this element, we first need to determine what the statute requires. Section (a), in setting out the crime, uses the term "facility *in* interstate or foreign commerce." Section (b), however, confusingly defines "facility *of* interstate commerce" for sections 1958 and 1959 and includes "means of transportation and communication" in that definition. 18 U.S.C. § 1958. Since neither section uses the term "facility *of* interstate commerce," the question is whether the broad definition in

(b) should apply to "facility *in* interstate or foreign commerce" in (a).[2]

This distinction is important.[3] In this context, "of" means "[b]elonging or connected to," while "in" means "[d]uring the act or process of." *Webster's II New College Dictionary* 557, 759 (Houghton Mifflin Co.1995). Under the term in (a), the use of the facility must have been in the process of interstate or foreign commerce. That would require us to undertake a fact-intensive inquiry to establish the interstate or foreign character of the instant use. If the definition in (b) applies, however, the statute would encompass even intrastate use of telephones or vehicles,

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[2] We observe that (b) does not include foreign commerce in its definition. We treat this as an oversight, inasmuch as there is no discernible reason for its omission, if (b) is intended to explain the substantive provisions in (a).

It also appears obvious that Congress made a mistake in mixing the terms "of" and "in," but it is not obvious which term reflects congressional intent.

[3] We disagree with the approach taken in *United States v. Coates*, 949 F.2d 104, 105 (4th Cir.1991), which ignored the difference in the statute's language between (a) and (b). The breadth of this statute and its sister statute, § 1952, is the subject of an ongoing debate among the circuit and district courts. *See, e.g., United States v. Heacock*, 31 F.3d 249, 254-55 (5th Cir.1994) (any use of the mails qualifies); *United States v. Barry*, 888 F.2d 1092, 1095-97 (6th Cir.1989) (requiring interstate use of the mail); *United States v. Riccardelli*, 794 F.2d 829, 830-34 (2d Cir.1986) (any use of the mails qualifies); *Krantz v. United States*, 1999 WL 557524 at *3-7 (E.D.N.Y.1999) (any use of mails qualifies); *United States v. Paredes*, 950 F.Supp. 584, 585-90 (S.D.N.Y.1996) (requiring interstate use of pagers).

since those are items connected to interstate commerce.[4] Both theories that the government presented to show

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[4] Existing case law establishes that telephones and automobiles are instrumentalities *of* interstate commerce even when used solely for intrastate purposes. *See United States v. Hickman*, 179 F.3d 230, 232 (5th Cir.1999) (holding that a car is an instrumentality of interstate commerce); *Dupuy v. Dupuy*, 511 F.2d 641, 644 (5th Cir.1975) (holding that intrastate use of phones qualifies as use of an instrumentality of interstate commerce); *United States v. Gilbert*, 181 F.3d 152, 157-58 (1st Cir.1999) (holding that a telephone is an instrumentality of interstate commerce, regardless of whether it is used in an interstate manner); *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir.1999) (intrastate telephone calls qualify as use of instrumentality of interstate commerce); *United States v. Cobb*, 144 F.3d 319, 322 (4th Cir.1998) (automobiles qualify as instrumentalities of interstate commerce); *United States v. Randolph*, 93 F.3d 656, 660 (9th Cir.1996) ("[C]ars are themselves instrumentalities of interstate commerce.").

Of course, these cases all refer to "instrumentalities," not "facilities." The case law is less clear when dealing with statutes referring to "facilities of interstate commerce." Some cases seem to find that any use of a phone or car is enough without discussing its intrastate or interstate character. *See, e.g., Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 (8th Cir.1982) (seemingly including any use of telephone); *United States v. Goldfarb*, 643 F.2d 422, 426 (6th Cir.1981) (interpreting the Travel Act). Others seem to require interstate or foreign use of such a facility. *See, e.g., Menendez v. United States*, 393 F.2d 312, 314 (5th Cir.1968) (emphasizing that use of phone was "long distance"); *United States v. Markiewicz*, 978 F.2d 786, 814 (2d Cir.1992) (emphasizing that the phone call was international); *United States v. Smith*, 789 F.2d 196, 203 (3d Cir.1986) (requiring interstate travel). We believe, however, that the important distinction is between the use of "of" and "in," not between "instrumentality" and "facility." The Sixth Circuit analyzed this statute and reached the same conclusion. *United States v. Weathers*, 169 F.3d 336, 341-42 (6th Cir.1999). Our own circuit has

how Cisneros's murder-for-hire satisfied the foreign commerce requirement, therefore, would easily qualify under the statute. Cisneros's plan obviously caused people to use both telephones and automobiles.

We begin statutory construction with an examination of the statute's language. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994). There are two parts to 18 U.S.C. § 1958, the substantive portion setting out the criminal act, (a); and (b), the portion providing definitions for the terms used in (a). Oddly, part (b) defines a term that is not found in subpart (a). Reading the statute literally, almost mathematically, we would disregard the "irrelevant" definition and apply the substantive portion, (a), alone.

But this rigid approach glosses over the ambiguity that does exist, the seemingly superfluous definition. The canons of construction do not help. We recognize that in reading a statute, every word should be given significance. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). But this gets us nowhere. The canon obviously counsels against ignoring

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not been bereft of discussions on the subject. See *United States v. Miles*, 122 F.3d 235, 246 (5th Cir.1997) (DeMoss, J., concurring) (distinguishing between "of" and "in" interstate commerce). A "facility of interstate commerce" is one by which interstate commerce is typically accomplished, regardless of its use in a particular instance. Use of a "facility in interstate commerce," on the other hand, indicates that the facility is "in" interstate commerce when it is being used in the particular instance; in other words, a facility "in" interstate commerce has a temporal element or requirement that a facility "of" interstate commerce lacks.

the definition in (b). If we use (b)'s broad definition to interpret "facility in interstate commerce," however, then the portion of (a) dealing with interstate and foreign travel would be rendered superfluous. Use of a "means of transportation" would cover any type of travel as well. The application of this canon, therefore, does not resolve our statutory quandary.

Another potential guide for us is case law interpreting the Travel Act, 18 U.S.C. § 1952. We have previously held that reviewing section 1958 in the light of section 1952 is appropriate, since section 1958 follows section 1952's format and was intended as its supplement. *United States v. Edelman*, 873 F.2d 791, 794 (5th Cir.1989). It is, therefore, potentially relevant that our circuit construed the Travel Act to include intrastate mailing. *See United States v. Heacock*, 31 F.3d 249, 254-55 (5th Cir.1994) (construing the Travel Act to include intrastate mailing).

We conclude, however, that our interpretation of the Travel Act in *Heacock* is inapplicable here. *Heacock* concerned an interpretation of the Travel Act as it read in 1988. At that time, the relevant portion read: "Whoever . . . uses any facility in interstate or foreign commerce, including the mail." *Id.* at 254.

A circuit split had developed between the Sixth and Second Circuits concerning whether purely intrastate use of the mails qualified under this portion of the statute. *See United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir.1989) (requiring interstate use of mail); *United States v. Riccardelli*, 794 F.2d 829, 831-33 (2d Cir.1986) (intrastate use of the mail would qualify). The Sixth Circuit had held in *Barry* that the statute applied to facilities, including the

mail, that were being used in interstate or foreign commerce. *Barry*, 888 F.2d at 1095. Thus, intrastate use of the mail would not fall within the statute's domain. In *Riccardelli*, on the other hand, the Second Circuit had held that "mail" in "including the mail" referred to the entire preceding clause, "facilit[ies] in interstate or foreign commerce." In other words, according to that court, the statute made clear that the mail was to be treated as distinct from all other facilities; that is, as a facility inherently "in interstate or foreign commerce."

The Second Circuit's treatment of the mails as distinct from all other facilities under the Travel Act was based on a thorough analysis of the statute and the history of the postal service. As the court explained, the U.S. Constitution specifically granted Congress the power to establish the postal service. U.S. Const. art. I § 8 cl. 7. From the presidency of James Monroe until the 1970 reorganization under President Nixon, the postal service was its own executive department, after which it became a government-owned corporation. *Riccardelli*, 794 F.2d at 831.

In *Heacock*, we examined this split and sided with the Second Circuit. The special character of the mail automatically made it a "facility in interstate commerce." *Heacock*, 31 F.3d at 255.

In 1990, Congress amended the Travel Act in a manner consistent with this interpretation. The heading to the relevant section read "CLARIFICATION OF APPLICABILITY OF 18 U.S.C.1952 TO ALL MAILINGS IN FURTHERANCE OF UNLAWFUL ACTIVITY." Act of Nov. 29, 1990, Pub.L. No. 101-647, § 1604, 1990 U.S.C.C.A.N. (104

Stat. 4843) (to be codified at 18 U.S.C. § 1952). The new language read: "Whoever . . . uses the mail *or* any facility in interstate or foreign commerce." 18 U.S.C. § 1952 (emphasis added). This was the version of the Travel Act that the federal murder-for-hire statute was to supplement and from which the drafters of 18 U.S.C. § 1958 drew their language.

Thus, it is clear that our *Heacock* analysis is limited to use of the mail, especially after Congress' 1990 amendment, because the mail is unique. It is plainly and unmistakenly treated separately from all other "facilities."

Ultimately, *Heacock* and other cases interpreting the Travel Act are not helpful to our inquiry because they do not face the same contradictory statutory language that we do today in the murder-for-hire statute. In construing the Travel Act, one need not wrestle with the distinctions and differing implications between "of" and "in." But we cannot avoid confronting them. Each term leads to a different result; the telephone used in making an in-state call is not one actually engaged in interstate or foreign commerce with respect to the particular use at issue, even though the telephone is itself a facility *of* interstate or foreign commerce.

We next turn to the legislative history of 18 U.S.C. § 1958, which finally provides some helpful guidance. The Senate Judiciary Committee's report on the bill supports a narrow reading of the statute in the interest of comity:

> The committee is aware of the concerns of local prosecutors with respect to the creation of concurrent federal jurisdiction in an area,

> namely murder cases, which has heretofore been the almost exclusive responsibility of state and local authorities. . . . This does not mean, nor does the committee intend, that all or even most such offenses should become matters of federal responsibility.

S.Rep. No. 225, 98th Cong., 1st Sess.1983, 1984 U.S.C.C.A.N. 3182, 3484.

This legislative history plainly suggests that we should eschew the broader reading of the statute. Using the definition in (b) to interpret "facility in interstate commerce" would extend the reach of the federal murder-for-hire statute to new realms of traditionally-exclusive state jurisdiction. It is difficult to imagine a murder-for-hire scheme that would not involve the use of a telephone or an automobile. This definition, therefore, would markedly increase criminal liability in this area. The narrower interpretation of the statute, which applies the substantive part of the statute in (a), appears to be the appropriate one to use.

Because we are reluctant to rely solely on legislative history to eliminate ambiguity, however, we also look to the quasi-constitutional rule of lenity, which counsels us to resolve ambiguity in criminal statutes by construing them narrowly. The rule of lenity fosters the fundamental principle of due process:

> This practice [of resolving questions of the ambit of criminal statutes in favor of lenity] reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at

peril of indictment, whether his conduct is prohibited.

Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743, (1979). Its propriety was recently reaffirmed by the Supreme Court in *United States v. Granderson*, 511 U.S. 39, 54, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994). The rule of lenity also supports a narrow interpretation of this statute rather than the imposition of potentially-unanticipated federal criminal liability.

Finally, this narrow interpretation accords with the Sixth Circuit's decision in *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir.1999). That court ignored the definition in (b) because "the key prohibition creating the criminal offense is found in subsection (a)." We agree.

C

In reviewing its sufficiency, we view the evidence in the light most favorable to the verdict and affirm if a rational trier of fact could find that the government proved all essential elements beyond a reasonable doubt. *United States v. Grossman*, 117 F.3d 255, 258 (5th Cir.1997). The government's proof need not exclude every reasonable hypothesis of innocence. *United States v. Haas*, 171 F.3d 259, 265 (5th Cir.1999).

Though the interstate/foreign commerce requirement in 18 U.S.C. § 1958 is jurisdictional, *United States v. Edelman*, 873 F.2d 791, 794-95 (5th Cir.1989), it is also an element of the offense. *United States v. Feola*, 420 U.S. 671, 677 n. 9, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). This circuit does require proof beyond a reasonable doubt of interstate/foreign commerce. *See, e.g., United States v.*

Thompson, 130 F.3d 676, (5th Cir.1997), *cert. denied*, 524 U.S. 920, 118 S.Ct. 2307, 141 L.Ed.2d 166 (1998) (using beyond reasonable doubt standard); *United States v. Thompson*, 130 F.3d 676, 688 (5th Cir.1997) (same).

Labeling this requirement "jurisdictional," however, does eliminate the need to prove scienter of that element. *United States v. Razo-Leora*, 961 F.2d 1140, 1148 (5th Cir.1992). It is enough that the proof showed interstate or foreign commerce in the commission of the offense and that Cisneros had knowledge of the nature of the offense that she promoted. *Edelman*, 873 F.2d at 795. The government did not need to establish that Cisneros intended to cause interstate/foreign commerce or even that she knew it occurred. *Id.*

D

The government did present sufficient evidence for a rational juror to conclude that Garza made international calls in arranging the murder-for-hire for Cisneros. Garza testified that from late 1992 until early 1993, he called Martinez four times from Mexico, twice from San Fernando, and twice from Matamoros. He explained that he made the calls from casetas and paid for them immediately afterwards because collect calls from Mexico were difficult to make.

During the calls, Garza would attempt to discuss his marital problems, but Martinez would interrupt and ask whether he had found someone to kill "the boy" for "her client." Although Garza initially lied to her about finding "men to do the job," the urgency of Martinez's demands

did not diminish. During each of Garza's calls, Martinez continued to press him to find assassins for "her client."

Cisneros makes two arguments in response. First, she contends that Garza's testimony about the Mexico calls lacks corroboration and contradicts Church's FBI report and testimony. It is true that Church's report and testimony indicate that he believed Garza told him the calls from Mexico to Martinez were collect, and that Martinez's phone records did not show any such calls. Garza, furthermore lacked any receipts proving they occurred.

The government's evidence, however, was nevertheless sufficient to prove the international phone calls. Credibility determinations are the exclusive province of the jury, *United States v. Ruiz*, 987 F.2d 243, 250 (5th Cir.1993), and the jury is entitled to choose among reasonable constructions of the evidence. *United States v. Thompson*, 130 F.3d 676, 685-86 (5th Cir.1997). As already explained, we read that evidence in the light most favorable to the jury verdict. *Grossman*, 117 F.3d at 258.[5] Here, Garza provided a reasonable explanation for why the calls were not collect. Given his language difficulties, some confusion during the interview with Church would be expected. Finally, Garza's lack of a receipt for these calls five years, or even five minutes, after they were made is not surprising. The conclusion that the calls were

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[5] This is true even when the jury reaches a general verdict based on two alternative theories. *See Griffin v. United States*, 502 U.S. 46, 49-51, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) (holding the jury verdict valid in this situation); *United States v. Powers*, 168 F.3d 741, 746 (5th Cir.1999) (evaluating sufficiency of the evidence with deference).

made, therefore, is legally supportable. It is not our province to become embroiled in a credibility debate between Church and Garza.

Second, Cisneros contends that the evidence did not establish that she caused the telephone to be used "in furtherance" of the murder-for-hire. With respect to causation, *Edelman* requires simple "but for" causation rather than foreseeability: "It is enough, therefore, that the proof showed the mails were in fact used in the commission of that offense and that Edelman had knowledge of the nature of the substantive offense which he promoted." 873 F.2d at 794. Martinez would not have discussed the murder-for-hire with Garza over the telephone but for Cisneros's request that Martinez find someone to kill Fischer.

The "in furtherance" requirement is not the law in this circuit. Instead, *Edelman* governs, and it requires that the use of the facility be "in the commission of the offense." 873 F.2d at 795. Even though Garza initiated the calls for an entirely different purpose, Martinez nevertheless used a facility in foreign commerce, the telephone, to discuss the murder. Cisneros's contention that Garza's lie – that he had already found someone – actually hindered the murder is not persuasive. Without Martinez's incessant reminders during those calls, it is reasonable for a jury to have believed that Garza would not have made as serious an effort to find a hit man.

Because these telephone calls satisfy the interstate nexus requirement, we need not address the more complicated issue, the car travel between Mexico and Texas.

II

Cisneros raises several other arguments on appeal, none of which require reversal of her conviction.

A

Cisneros asks for a new trial based upon two instances of the government eliciting testimony about state court proceedings related to the murder. The trial court had issued an order that prohibited eliciting testimony that Cisneros had been tried for the offense in state court.

First, it is true that the government improperly elicited testimony in violation of the order:

> Q: Do you remember what you charged him [Garza] with?
>
> A: Yes, sir.
>
> Q: What was that?
>
> A: Capital Murder.
>
> Q: The same charge that you had charged Maria Martinez and Dora Cisneros with?
>
> Yes, sir.

Defense counsel immediately moved for a mistrial, which the trial court denied.

We will not reverse the court's denial because it was not an abuse of discretion. *United States v. Krout*, 56 F.3d 643, 647 (5th Cir.1995). "A new trial is required only if there is a 'significant possibility' that the prejudicial evidence had a 'significant impact' upon the jury verdict,

viewed in light of the entire record." *United States v. Layne*, 43 F.3d 127, 134 (5th Cir.1995). Simply stated, in a trial lasting seven days, any prejudicial effect from this interchange is not enough to justify a mistrial. The government spent almost five-and-a-half days presenting a thorough case-in-chief. The defense, on the other hand, used half a day to present its case.[6] With such a gross imbalance of evidence in favor of the government, it is hard to believe that the brief interchange above had any impact on the jury's decision. Denial of a mistrial was not an abuse of discretion.

Second, the government elicited testimony six days after this interchange that Garza had been convicted of capital murder in the Fischer homicide. Defense counsel objected, and the trial court overruled the objection. Cisneros now charges that the government tried to get the jury to infer that since Garza and Cisneros were both charged, and since Garza was convicted, that Cisneros was also tried in state court.

The admission of this testimony was not an abuse of discretion, since there was no chance of any "significant impact" on the jury verdict. *United States v. Morgan*, 117 F.3d 849, 861 (5th Cir.1997); *Layne*, 43 F.3d at 134. By itself, this testimony did not violate the district court's order. The defense can only take issue with the testimony by tying it to the earlier testimony about charges against Cisneros. There is no reason to believe that the jury drew such a connection to conclude that Cisneros had also

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[6] The seventh day was spent on closing argument and jury instruction.

been convicted. The government had good reason, moreover, to ask Garza about his conviction. The prosecutors wanted to minimize the effectiveness of any cross-examination about the deal they had given him.

B

Cisneros next objects to denial of five of her proposed jury instructions. We review refusal to include requested instructions for an abuse of discretion. *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir.1994). Defendants are entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in their favor, *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). But refusal to include a requested instruction is reversible error only if the requested instruction is substantially correct, the actual charge given the jury did not substantially cover the content of the proposed instruction, and the omission of the proposed instruction would seriously impair the defendant's ability to present a defense. *United States v. Pettigrew*, 77 F.3d 1500, 1510 (5th Cir.1996).

Cisneros first sought to instruct the jury that the interstate/foreign commerce connection had to have been "in furtherance" of the murder-for-hire. Because this instruction is taken from the First Circuit's decision in *United States v. Houlihan*, 92 F.3d 1271, 1292 (1st Cir.1996), rather than our decision in *Edelman*, it is neither the law in this circuit nor substantially correct. The court's refusal was appropriate.

The court instead explained to the jurors that to find Cisneros guilty, they had to determine: "Number one,

that [Cisneros] caused another to travel in foreign or interstate commerce or caused another to use a facility in foreign commerce" to find Cisneros guilty. By setting out the causation requirement this clearly, the court established that use of such a facility would have to be the result of Cisneros's actions, and therefore in the commission of the offense charged.

Cisneros's second proposal was a "theory of the defense" instruction. What she requested was essentially an extended instruction on the government's burden of proof. Since the district court repeatedly emphasized that the government carried that burden, its instruction covered Cisneros' desired instruction. Moreover, the court's refusal did not hinder Cisneros' presentation of a defense in any way.

Part of Cisneros's "theory of the defense" instruction did go beyond restatement of the burden of proof. It set forth Cisneros's position that any of Pizana's travel in foreign commerce on March 2 was related to the stolen vehicle or drug businesses, not the murder-for-hire. It also explained that Cisneros believed any of Garza's calls to Martinez were made for the purpose of discussing his marital difficulties. Since these represent mere "judicially narrated accounts" of Cisneros's facts, their submission to the jury was unnecessary. *See Pettigrew*, 77 F.3d at 1514.

Cisneros's third proposed instruction sought to limit the jury's consideration of tape-recorded conversations between Garza and Martinez and between Martinez and

Cisneros.[7] When the government offered those tapes into evidence, however, Cisneros's counsel failed to object properly:

> THE COURT: Any objection to the admission of the tapes?
>
> MR. CANALES: No.
>
> . . .
>
> MR. CANALES: Multiple purposes of impeachment, I understand.
>
> MR. MOSBACKER: No, Your Honor. They are being offered for purposes of rehabilitation of the witness and also for completeness of the conversations.
>
> THE COURT: There being no objections, all [the tapes] are admitted into evidence.

Assuming that some portion of the tapes included hearsay, Cisneros did not raise a timely objection to its admission. She is required to do so under Fed.R.Evid. 103(a)(1). *United States v. Wake*, 948 F.2d 1422, 1435 (5th Cir.1991). Without such an objection, we review for plain error. *Id.* The admission of this evidence, to the extent it was erroneous, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, especially since it was the defendant who first alluded to portions of the tapes. *See United States v. Olano*, 507 U.S. 725, 731-36, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Cisneros's fourth desired instruction was an explanation of "causation" that she took from what we require

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[7] These conversations related to the purpose behind money transfers between Garza, Martinez, and Cisneros.

for federal mail fraud. This instruction charged that causation existed when the defendant knew that the travel in or use of facilities in interstate/foreign commerce would result, or that such a result was reasonably foreseeable. Because this is not the law in the circuit for 18 U.S.C. § 1958 under *Edelman*, the court's refusal to issue this instruction was justified.

Cisneros's fifth instruction concerned the five-year statute of limitations. Its omission did not impair Cisneros's ability to present a defense because there was no defense under the statute of limitations. It is well-recognized that the time period begins to run when the crime is complete. *Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). And we have previously held that one of the elements of the federal murder-for-hire offense is receipt of pecuniary value or a promise or agreement to pay. *United States v. Thompson*, 130 F.3d 676, 688 (5th Cir.1997).

In this case, Cisneros's indictment charged her with "caus[ing] another to . . . use a facility in foreign commerce . . . with the intent that the murder of Alebert Joseph (Joey) Fischer, Jr. be committed . . . as consideration for a promise and agreement to pay, *and the receipt of, $3,000.*" The crime, as charged and tried by the government, was complete upon the receipt of the $3,000.00 payment. The government presented uncontroverted testimony that Martinez paid Garza $3,000 on the day of the murder, March 3, 1993. Cisneros was indicted less than five years later, on February 23, 1998. The statute of limitations, therefore, was not a defense available to Cisneros.

C

Cisneros's next argument, that the district court erred in admitting the evidence of Fischer's murder under Fed.R.Evid. 403, is foreclosed by *United States v. Hall*, 152 F.3d 381, 400-403 (5th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1767, 143 L.Ed.2d 797 (1999). Contrary to Cisneros's assertion, her offer to stipulate to the shooting of Fischer did not reduce the probative value of evidence of how Fischer's parents found their son, the pathologist's testimony about Fischer's autopsy, or the photographs of Fischer's corpse. This testimony and these pictures were not more gruesome or more disturbing than those admitted in *Hall* or the cases cited therein. *See Hall*, 152 F.3d at 401 (citations omitted). The probative value of the challenged evidence, therefore, was not substantially outweighed by the danger of unfair prejudice. *See id.* (citations omitted).[8]

D

We also reject Cisneros's argument that the conviction should be reversed because the district court failed to maintain an appearance of impartiality in its questioning of witnesses and comments made during the trial. First, Cisneros contends that in questioning Garza, the district court made the government's case instead of

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[8] Cisneros's reliance on *Old Chief v. United States*, 519 U.S. 172, 183 n. 7, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) is misplaced. The Supreme Court expressly noted that its holding was limited to cases involving proof of felon status. *Old Chief*, 519 U.S. at 183 n. 7, 117 S.Ct. 644.

merely clarifying the evidence. Second, Cisneros maintains that the district court unfairly assisted the government in overcoming objections. One was a hearsay objection to a police officer's testimony about Ramiro Moya's involvement in Fischer's murder, and the other was an objection to the form of the question asking Moreno about Cuellar's state of mind after Palomares telephoned to report the murder. Third, Cisneros argues that the court's treatment of defense counsel exhibited favoritism in front of the jury.

After reviewing the transcript, we cannot conclude that the district court's behavior was so "prejudicial that it denied the defendant a fair, as opposed to a perfect trial." *United States v. Bermea*, 30 F.3d 1539, 1569 (5th Cir.1994) (citations omitted). The questions to the witnesses, periodic assistance to government counsel, and occasional chastisement of defense counsel did not make the trial unfair.

The first issue is the court's questioning of witnesses. During trial, Garza explained that he had called Martinez from San Fernando, 100 miles south of the Rio Grande. The district court interjected and asked Garza if San Fernando was located in Mexico and whether he had talked to Martinez from Mexico. Garza answered both questions affirmatively. The court also asked Garza whether he and Martinez had discussed "something else" beyond his marital problems when he called her from Mexico. Garza replied that the two had discussed whether he had found the "guys [that] she [Martinez] wanted to cause harm to this boy."

Garza later testified that he met Olivarez in Dallas to tell him about "a lady in Brownsville who had . . . $3000.00 to beat up or kill this person." Garza then said he provided a picture and address to help Olivarez identify Fischer. The district court immediately asked Garza whether he had the picture during his initial conversation with Olivarez in Dallas. The court also asked Garza whether Olivarez agreed during the meeting to commit the murder. Garza answered "whenever they would go to Brownsville."

The district court's questions did not deny Cisneros a fair trial. A trial court has the discretion to clarify testimony, even if that elicits facts harmful to the defendant. *United States v. Saenz*, 134 F.3d 697, 708 (5th Cir.1998) (citations omitted). The district court may also bring out new facts through its questioning. *United States v. Cantu*, 167 F.3d 198, 202 (5th Cir.1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 58, 145 L.Ed.2d 50 (1999) (citations omitted). The trial court stayed within these limits. Garza was a difficult witness to understand because of problems with English. The court's questions were designed to clarify his vague, confusing, and often incomplete statements.

The record further establishes that the court's assistance in overcoming Cisneros's objections did not exhibit bias in the government's favor. In both instances, the district court merely instructed prosecutors to rephrase their questions. The district court properly controlled the tempo of the trial so as to avoid repetitious objections and to keep the proceeding moving forward. *See Bermea*, 30 F.3d at 1570-71.

Finally, Cisneros points to several instances where the court treated defense counsel with less than perfect courtesy. Having examined the transcript, these do not go beyond acceptable courtroom behavior, especially in the face of some of defense counsel's antics.

In sum, we find that the district court's intervention in the trial hardly rises to the level we found objectionable in *Saenz*, 134 F.3d at 713-14. Indeed, nothing in the district court's questions or comments "could have led the jury to a predisposition of guilt by improperly confusing the functions of the judge and the prosecutor." *Bermea*, 30 F.3d at 1569 (citing *United States v. Samak*, 7 F.3d 1196, 1197-98 (5th Cir.1993)).

The district court, moreover, twice instructed the jury regarding the court's participation in the trial. We have previously held that curative instructions such as this one ameliorate potential prejudicial effect of a district court's comments or questions. *See Bermea*, 30 F.3d at 1571-72 (citations omitted). At the beginning of the trial as well as at the close of the evidence, the district court explained to the jury that it did not have an opinion about the case, and to disregard any statements that might indicate otherwise. The court then charged the jury not to give the court's question more or less weight than those of the lawyers.

E

Finally, the district court did not abuse its discretion in admitting Moreno's testimony under the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E). Cisneros argues that assuming *arguendo*

there existed a conspiracy to kill Fischer, the admission of Moreno's testimony under the co-conspirator exception was in error because Moreno had no involvement in the murder. We find this argument frivolous.

Moreno testified that he and Garza were both employed in Cuellar's organization and that Palomares and Olivarez acted as hit men for the organization. Moreno also acknowledged that because he was a member of Cuellar's crime family,[9] Cuellar told him about conversations with Garza concerning the "Brownsville murder." In early February 1993, Moreno accompanied Garza to a Dallas gun shop where Garza bought a .38 Super – the same type of pistol as the one used to shoot Fischer. The record further shows that Moreno gave Garza the purchase money, which had been supplied by Cuellar. Immediately after the sale, Moreno took possession of the weapon and delivered it to Cuellar that same day. Moreno later overheard a conversation between Palomares and Cuellar, during which Palomares stated that he had killed a person in Brownsville. Finally, Moreno stated that Palomares, Pizana, and Olivarez were involved in the "Brownsville murder" and that the murder was committed because of a contract Garza made with "a certain person."

The government met its burden of proving the co-conspirator exception to the hearsay rule by a preponderance of the evidence. *See United States v. Narviz-Guerra*, 148 F.3d 530, 536 (5th Cir.), *cert. denied*, 525 U.S.

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[9] Moreno was an enforcer for Cuellar. He picked up drug money and delivered drugs to Cuellar's stash houses.

1046, 119 S.Ct. 601, 142 L.Ed.2d 543 (1998); *United States v. Ruiz*, 987 F.2d 243, 247 (5th Cir.), *cert. denied*, 510 U.S. 855, 114 S.Ct. 163, 126 L.Ed.2d 123 (1993). Moreno was integrally involved in the operations of Cuellar's organization, the one that planned and executed Fischer's murder.

III

For the reasons stated herein, Cisneros's conviction is in all respects

AFFIRMED.

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Dora Garcia CISNEROS, Defendant-Appellant.

No. 98-40955.

Feb. 3, 2000.

James Lee Turner (argued), Paula Camille Offenhauser, Asst. U.S. Atty., Houston, TX, for Plaintiff-Appellee.

David L. Botsford (argued), Austin, TX, J.A. Canales, Jo Ellen Hewins, Canales & Simonson, Corpus Christi, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, JOLLY and DUHE, Circuit Judges.

ON PETITION FOR REHEARING &
SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

The original opinion in this matter was issued by the panel on October 28, 1999. A petition for rehearing is currently pending before this panel. The petition for panel rehearing is granted to the extent that we VACATE our previous opinion and replace it with the following opinion. In all other respects, the petition for panel rehearing is DENIED.

OPINION

Before POLITZ, JOLLY and DUHE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Joey Fischer, a high school student, was murdered in cold blood by a hired killer – a killer hired by the mother of an erstwhile girlfriend.

Fischer and Christina Cisneros ("Christina"), were in high school in Brownsville, a Texas border town. They began dating in the spring of 1992. But Fischer ended the courtship after only several weeks to the bitter disappointment of the Cisneros family.

Dora Cisneros ("Cisneros"), Christina's mother, first tried to persuade Fischer to change his mind. Fischer was not interested. When this did not work, Cisneros went to a fortune teller named Maria Martinez to find out whether Fischer was destined to marry Christina. The tarot cards did not hold the answer she wanted, so Cisneros told Martinez to put a curse on the young man.

Near the end of October, Cisneros turned to a more mundane solution: she asked Martinez to find someone to beat up Fischer. By winter, Cisneros had decided to have him murdered instead.

Now enter Daniel Garza. Garza had also been unlucky at love. He and his wife separated in the spring of 1992. Soon afterwards, he came to Martinez, asking what he might do to rekindle the fire of romance with his wife. During one of their meetings in October 1992, Martinez's thoughts reverted to the lost romance of the scorned Christina. She asked Garza about finding someone to rough up Fischer. In late January or early February,

however, Martinez upped the ante with Garza: she relayed that "the client" wanted the boy killed.

Though Garza assured Martinez that he would find someone for the job, he was more immediately concerned with rejuvenating his own fast-fading love life. In the ensuing weeks, he frequently called Martinez to discuss schemes to get his wife to return. In the meantime, however, Martinez, was under almost daily pressure from Cisneros for news on the planned retribution against Fischer. Feeling the pressure, Martinez would interrupt Garza during their conversations to find out if he had found someone to kill Fischer. Garza lied several times and said he had found someone to commit the crime. The two would then discuss the murder before returning to the subject of a plan to plant the stirrings of love in the heart of Garza's wife.

There is an important – a highly important – question about where Garza placed these calls. At trial, he testified that he made at least four calls from two Mexican towns, San Fernando and Matamoros. He said that he had placed them in "casetas," booths where a caller pays for the call after making it. During cross-examination, however, defense counsel asked him why an FBI report from his interview with an agent said that he had made the calls collect. Garza testified that the agent was mistaken. Garza went on to explain that collect calls from Mexico were difficult, though he may have made one of them to Martinez. In its case-in-chief, the defense tried to show that no calls were made from Mexico. FBI Agent David Church was called as a defense witness. He testified that while Garza had told him that all the calls were collect, Martinez's phone records did not show any such calls.

In early February 1993, Garza found the men to kill Fischer: Israel Olivarez and Heriberto "Eddie" Pizana. He met them in Brownsville, at the home of Olivarez's uncle. Like Garza, they worked for Rudy Cuellar in a drug smuggling and auto theft operation stretching from Mexico to Chicago. Olivarez and Pizana were car thieves and hit men for the organization. Garza met with the two again in Dallas on February 14 to explain what he wanted. Olivarez said that they would commit the crime the next time they were in Brownsville. Garza gave them a photo of Fischer and a map to his house.

On the afternoon of March 2, Garza was returning from San Fernando, Mexico, to San Antonio, Texas. He stopped at the La Quinta Inn in Brownsville, where he happened to find Olivarez. Olivarez told him that "he was ready to do the job."

We now turn to a development of uncertain connection to the hired killers, but one that we must mention. At 6:39 that evening, a car crossed into the United States from Mexico at the Brownsville point of entry. Border authorities recorded its Mexican license plate number as "821 THE7." A vehicle with that plate had crossed the border eighteen times between August 1992 and March 1993. At 8:26 p.m., Pizana and Ramon Palomares, another Cuellar hit man, checked into the La Quinta Inn. The receptionist registered their car as a white Grand Marquis with Mexican plates. Her handwriting made it hard to decipher whether the plate number was "821 TWEX" or "821 THE7."

We now come to the implementation of this insane and tragic scheme. A little after 7:00 a.m. on March 3,

Fischer was shot and killed in his driveway. The physical evidence consisted of a bail bondsman's business card found next to the body and a tennis shoeprint on the outside air conditioning unit. The only other clue to the killer's identity was a witness who remembered passing a four-door white car with Mexican plates driving in the vicinity of Fischer's house near the time of the murder. The witness described the man in the car as Hispanic, twenty-three to twenty-five years old, with a short beard.

Then the conspirators spread the news that the deed was done. Between 7:00 and 8:00 the morning of the murder, Olivarez called Garza to tell him that Fischer was dead. Garza immediately relayed this news to Martinez, who said that she could not get the money from her client without proof of the murder. Garza then discussed the situation with Olivarez at the La Quinta Inn. Pizana was also in the room, but not Palomares. After the discussion, Pizana and Garza visited Martinez, who gave them the money. When the two returned to the La Quinta, Garza tried to give Pizana the money, but he declined and told Garza to give it directly to Olivarez. Garza did that and noticed before leaving that Olivarez and Pizana had two white vehicles: a white pickup truck with a black stripe and a white Ford.

Fortunately, the bondsman's business card had handwriting on the back, and it matched Cuellar's handwritten bond application. They also began pursuing information on Cuellar's associates, Pizana, Olivarez, and Ramiro Moya. They learned about Garza through Moya, Garza's brother.

Garza became the key that opened the gate through which other conspirators were herded. He agreed to set up a meeting with Martinez and to wear a wire. He called her twice to tell her that the gunmen wanted more money, and each time she gave it to him. The police then arrested Martinez and had her wear a wire for a meeting with Cisneros. They arrested Cisneros in her car as she was giving Martinez $500.

At trial, testimony by a person working for Cuellar, Victor Moreno, helped establish the link between Cuellar and the murder. Moreno testified that he heard about the Fischer murder within the Cuellar organization. He had also been with Cuellar when Palomares phoned Cuellar to report the murder of "a boy" in Brownsville.

Cisneros and her accomplices were convicted in state court for capital murder. The Texas appellate court overturned the conviction, however, for insufficiency of evidence linking her to the murder. The state then turned the case over to federal prosecutors, who charged Cisneros under the federal murder-for-hire statute, 18 U.S.C. § 1958. She was convicted in May 1998. The district court then denied her motion for judgment notwithstanding the verdict and for a new trial. Cisneros has now appealed, citing seven different instances of insufficient evidence and error.

I

A

The first, and most complex, issue that this case presents is whether there is sufficient evidence to show

that Cisneros met the interstate/foreign commerce requirement for a federal murder-for-hire conviction. In 1993,[1] the relevant parts of the statute read:

(a) *Whoever* travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or *uses or causes another* (including the intended victim) *to use* the mail or *any facility in* interstate or *foreign commerce, with intent that a murder be committed* in violation of the laws of any State or the United States *as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value,* shall be fined not more than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

(b) *As used in this section and section 1959 . . .*

(2) *"facility of interstate commerce "* includes means of transportation and communication.

18 U.S.C. § 1958 (emphasis added). The government asserts that it proved this interstate/foreign commerce requirement in two ways, either of which was sufficient. First, Garza's phone calls from Mexico to Martinez in Brownsville qualify as use of a "facility in interstate or

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[1] The murder occurred in 1993. In 1994, the statute was amended to allow for capital punishment when death resulted from a murder-for-hire. Pub.L. 103-322, § 60003(a)(11), 108 Stat.1969, 2033 (1994).

foreign commerce" caused by Cisneros. Second, the matching license plate numbers from the vehicle that crossed into the United States from Mexico and was later registered at the La Quinta Inn to Pizana and Palomares, combined with the sighting of a white vehicle near the scene of the crime, demonstrates that Cisneros caused another to travel in foreign commerce.

B

To determine whether the government presented evidence sufficient to satisfy this element, we first need to determine what the statute requires. Section (a), in setting out the crime, uses the term "facility *in* interstate or foreign commerce." Section (b), however, confusingly defines "facility *of* interstate commerce" for sections 1958 and 1959 and includes "means of transportation and communication" in that definition. 18 U.S.C. § 1958. Since neither section uses the term "facility *of* interstate commerce," the question is whether the broad definition in (b) should apply to "facility *in* interstate or foreign commerce" in (a).[2]

This distinction is important.[3] In this context, "of" means "[b]elonging or connected to," while "in" means

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[2] We observe that (b) does not include foreign commerce in its definition. We treat this as an oversight, inasmuch as there is no discernible reason for its omission, if (b) is intended to explain the substantive provisions in (a).

It also appears obvious that Congress made a mistake in mixing the terms "of" and "in," but it is not obvious which term reflects congressional intent.

[3] We disagree with the approach taken in *United States v. Coates*, 949 F.2d 104, 105 (4th Cir.1991), which ignored the

"[d]uring the act or process of." *Webster's II New College Dictionary* 557, 759 (Houghton Mifflin Co.1995). Under the term in (a), the use of the facility must have been in the process of interstate or foreign commerce. That would require us to undertake a fact-intensive inquiry to establish the interstate or foreign character of the instant use. If the definition in (b) applies, however, the statute would encompass even intrastate use of telephones or vehicles, since those are items connected to interstate commerce.[4] Both theories that the government presented to show

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difference in the statute's language between (a) and (b). The breadth of this statute and its sister statute, § 1952, is the subject of an ongoing debate among the circuit and district courts. *See, e.g., United States v. Heacock*, 31 F.3d 249, 254-55 (5th Cir.1994)(any use of the mails qualifies); *United States v. Barry*, 888 F.2d 1092, 1095-97 (6th Cir.1989)(requiring interstate use of the mail); *United States v. Riccardelli*, 794 F.2d 829, 830-34 (2d Cir.1986)(any use of the mails qualifies); *Krantz v. United States*, 1999 WL 557524 at *3-7 (E.D.N.Y.1999)(any use of mails qualifies); *United States v. Paredes*, 950 F.Supp. 584, 585-90 (S.D.N.Y.1996)(requiring interstate use of pagers).

[4] Existing case law establishes that telephones and automobiles are instrumentalities *of* interstate commerce even when used solely for intrastate purposes. *See United States v. Hickman*, 179 F.3d 230, 232 (5th Cir.1999)(holding that a car is an instrumentality of interstate commerce); *Dupuy v. Dupuy*, 511 F.2d 641, 643-44 (5th Cir.1975)(holding that intrastate use of phones qualifies as use of an instrumentality of interstate commerce); *United States v. Gilbert*, 181 F.3d 152, 157-58 (1st Cir.1999)(holding that a telephone is an instrumentality of interstate commerce, regardless of whether it is used in an interstate manner); *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir.1999)(intrastate telephone calls qualify as use of instrumentality of interstate commerce); *United States v. Cobb*, 144 F.3d 319, 322 (4th Cir.1998)(automobiles qualify as instrumentalities of interstate commerce); *United States v.*

how Cisneros's murder-for-hire satisfied the foreign commerce requirement, therefore, would easily qualify under the statute. Cisneros's plan obviously caused people to use both telephones and automobiles.

Randolph, 93 F.3d 656, 660 (9th Cir.1996)("[C]ars are themselves instrumentalities of interstate commerce.").

Of course, these cases all refer to "instrumentalities," not "facilities." The case law is less clear when dealing with statutes referring to "facilities of interstate commerce." Some cases seem to find that any use of a phone or car is enough without discussing its intrastate or interstate character. *See, e.g., Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 (8th Cir.1982)(seemingly including any use of telephone); *United States v. Goldfarb*, 643 F.2d 422, 426 (6th Cir.1981)(interpreting the Travel Act). Others seem to require interstate or foreign use of such a facility. *See, e.g., Menendez v. United States*, 393 F.2d 312, 314 (5th Cir.1968)(emphasizing that use of phone was "long distance"); *United States v. Markiewicz*, 978 F.2d 786, 814 (2d Cir.1992)(emphasizing that the phone call was international); *United States v. Smith*, 789 F.2d 196, 203 (3d Cir.1986)(requiring interstate travel). We believe, however, that the important distinction is between the use of "of" and "in," not between "instrumentality" and "facility." The Sixth Circuit analyzed this statute and reached the same conclusion. *United States v. Weathers*, 169 F.3d 336, 341-42 (6th Cir.1999). Our own circuit has not been bereft of discussions on the subject. *See United States v. Miles*, 122 F.3d 235, 246 (5th Cir.1997)(DeMoss, J., concurring) (distinguishing between "of" and "in" interstate commerce). A "facility of interstate commerce" is one by which interstate commerce is typically accomplished, regardless of its use in a particular instance. Use of a "facility in interstate commerce," on the other hand, indicates that the facility is "in" interstate commerce when it is being used in the particular instance; in other words, a facility "in" interstate commerce has a temporal element or requirement that a facility "of" interstate commerce lacks.

We begin statutory construction with an examination of the statute's language. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994). There are two parts to 18 U.S.C. § 1958, the substantive portion setting out the criminal act, (a); and (b), the portion providing definitions for the terms used in (a). Oddly, part (b) defines a term that is not found in subpart (a). Reading the statute literally, almost mathematically, we would disregard the "irrelevant" definition and apply the substantive portion, (a), alone.

But this rigid approach glosses over the ambiguity that does exist, the seemingly superfluous definition. The canons of construction do not help. We recognize that in reading a statute, every word should be given significance. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). But this gets us nowhere. The canon obviously counsels against ignoring the definition in (b). If we use (b)'s broad definition to interpret "facility in interstate commerce," however, then the portion of (a) dealing with interstate and foreign travel would be rendered superfluous. Use of a "means of transportation" would cover any type of travel as well. The application of this canon, therefore, does not resolve our statutory quandary.

Another potential guide for us is case law interpreting the Travel Act, 18 U.S.C. § 1952. We have previously held that reviewing section 1958 in the light of section 1952 is appropriate, since section 1958 follows section 1952's format and was intended as its supplement. *United States v. Edelman*, 873 F.2d 791, 794 (5th Cir.1989). It is, therefore, potentially relevant that our circuit construed the Travel Act to include intrastate mailing. *See United*

States v. Heacock, 31 F.3d 249, 254-55 (5th Cir.1994)(construing the Travel Act to include intrastate mailing).

We conclude, however, that our interpretation of the Travel Act in *Heacock* is inapplicable here. *Heacock* concerned an interpretation of the Travel Act as it read in 1988. At that time, the relevant portion read: "Whoever . . . uses any facility in interstate or foreign commerce, including the mail." *Id.* at 254.

A circuit split had developed between the Sixth and Second Circuits concerning whether purely intrastate use of the mails qualified under this portion of the statute. *See United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir.1989)(requiring interstate use of mail); *United States v. Riccardelli*, 794 F.2d 829, 831-33 (2d Cir.1986)(intrastate use of the mail would qualify). The Sixth Circuit had held in *Barry* that the statute applied to facilities, including the mail, that were being used in interstate or foreign commerce. *Barry*, 888 F.2d at 1095. Thus, intrastate use of the mail would not fall within the statute's domain. In *Riccardelli*, on the other hand, the Second Circuit had held that "mail" in "including the mail" referred to the entire preceding clause, "facilit[ies] in interstate or foreign commerce." In other words, according to that court, the statute made clear that the mail was to be treated as distinct from all other facilities; that is, as a facility inherently "in interstate or foreign commerce."

The Second Circuit's treatment of the mails as distinct from all other facilities under the Travel Act was based on a thorough analysis of the statute and the history of the postal service. As the court explained, the U.S. Constitution specifically granted Congress the power to

establish the postal service. U.S. Const. art. I § 8 cl. 7. From the presidency of James Monroe until the 1970 reorganization under President Nixon, the postal service was its own executive department, after which it became a government-owned corporation. *Riccardelli,* 794 F.2d at 831.

In *Heacock,* we examined this split and sided with the Second Circuit. The special character of the mail automatically made it a "facility in interstate commerce." *Heacock,* 31 F.3d at 255.

In 1990, Congress amended the Travel Act in a manner consistent with this interpretation. The heading to the relevant section read "CLARIFICATION OF APPLICABILITY OF 18 U.S.C. § 1952 TO ALL MAILINGS IN FURTHERANCE OF UNLAWFUL ACTIVITY." Act of Nov. 29, 1990, Pub.L. No. 101- 647, § 1604, 1990 U.S.C.C.A.N. (104 Stat. 4843)(to be codified at 18 U.S.C. § 1952). The new language read: "Whoever . . . uses the mail *or* any facility in interstate or foreign commerce." 18 U.S.C. § 1952 (emphasis added). This was the version of the Travel Act that the federal murder-for- hire statute was to supplement and from which the drafters of 18 U.S.C. § 1958 drew their language.

Thus, it is clear that our *Heacock* analysis is limited to use of the mail, especially after Congress' 1990 amendment, because the mail is unique. It is plainly and unmistakenly treated separately from all other "facilities."

Ultimately, *Heacock* and other cases interpreting the Travel Act are not helpful to our inquiry because they do not face the same contradictory statutory language that we do today in the murder-for-hire statute. In construing

the Travel Act, one need not wrestle with the distinctions and differing implications between "of" and "in." But we cannot avoid confronting them. Each term leads to a different result; the telephone used in making an in-state call is not one actually engaged in interstate or foreign commerce with respect to the particular use at issue, even though the telephone is itself a facility *of* interstate or foreign commerce.

We next turn to the legislative history of 18 U.S.C. § 1958, which finally provides some helpful guidance. The Senate Judiciary Committee's report on the bill supports a narrow reading of the statute in the interest of comity:

> The committee is aware of the concerns of local prosecutors with respect to the creation of concurrent federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of state and local authorities. . . . This does not mean, nor does the committee intend, that all or even most such offenses should become matters of federal responsibility.

S.Rep. No. 225, 98th Cong., 1st Sess.1983, 1984 U.S.C.C.A.N. 3182, 3484.

This legislative history plainly suggests that we should eschew the broader reading of the statute. Using the definition in (b) to interpret "facility in interstate commerce" would extend the reach of the federal murder-for-hire statute to new realms of traditionally-exclusive state jurisdiction. It is difficult to imagine a murder-for-hire scheme that would not involve the use of a telephone or an automobile. This definition, therefore,

would markedly increase criminal liability in this area. The narrower interpretation of the statute, which applies the substantive part of the statute in (a), appears to be the appropriate one to use.

Because we are reluctant to rely solely on legislative history to eliminate ambiguity, however, we also look to the quasi-constitutional rule of lenity, which counsels us to resolve ambiguity in criminal statutes by construing them narrowly. The rule of lenity fosters the fundamental principle of due process:

> This practice [of resolving questions of the ambit of criminal statutes in favor of lenity] reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.

Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743, (1979). Its propriety was recently reaffirmed by the Supreme Court in *United States v. Granderson*, 511 U.S. 39, 54, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994). The rule of lenity also supports a narrow interpretation of this statute rather than the imposition of potentially-unanticipated federal criminal liability.

Finally, this narrow interpretation accords with the Sixth Circuit's decision in *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir.1999). That court ignored the definition in (b) because "the key prohibition creating the criminal offense is found in subsection (a)." We agree.

C

In reviewing its sufficiency, we view the evidence in the light most favorable to the verdict and affirm if a rational trier of fact could find that the government proved all essential elements beyond a reasonable doubt. *United States v. Grossman*, 117 F.3d 255, 258 (5th Cir.1997). The government's proof need not exclude every reasonable hypothesis of innocence. *United States v. Haas*, 171 F.3d 259, 265 (5th Cir.1999).

Though the interstate/foreign commerce requirement in 18 U.S.C. § 1958 is jurisdictional, *United States v. Edelman*, 873 F.2d 791, 794-95 (5th Cir.1989), it is also an element of the offense. *United States v. Feola*, 420 U.S. 671, 677 n. 9, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). This circuit does require proof beyond a reasonable doubt of interstate/foreign commerce. *See, e.g., United States v. Thompson*, 130 F.3d 676, (5th Cir.), *cert. denied*, 524 U.S. 920, 118 S.Ct. 2307, 141 L.Ed.2d 166 (1998)(using beyond reasonable doubt standard).

Labeling this requirement "jurisdictional," however, does eliminate the need to prove scienter of that element. *United States v. Razo-Leora*, 961 F.2d 1140, 1148 (5th Cir.1992). It is enough that the proof showed interstate or foreign commerce in the commission of the offense and that Cisneros had knowledge of the nature of the offense that she promoted. *Edelman*, 873 F.2d at 795. The government did not need to establish that Cisneros intended to cause interstate/foreign commerce or even that she knew it occurred. *Id.*

D

The government did present sufficient evidence for a rational juror to conclude that Garza made international calls in arranging the murder- for-hire for Cisneros. Garza testified that from late 1992 until early 1993, he called Martinez four times from Mexico, twice from San Fernando, and twice from Matamoros. He explained that he made the calls from casetas and paid for them immediately afterwards because collect calls from Mexico were difficult to make.

During the calls, Garza would attempt to discuss his marital problems, but Martinez would interrupt and ask whether he had found someone to kill "the boy" for "her client." Although Garza initially lied to her about finding "men to do the job," the urgency of Martinez's demands did not diminish. During each of Garza's calls, Martinez continued to press him to find assassins for "her client."

Cisneros makes two arguments in response. First, she contends that Garza's testimony about the Mexico calls lacks corroboration and contradicts Church's FBI report and testimony. It is true that Church's report and testimony indicate that he believed Garza told him the calls from Mexico to Martinez were collect, and that Martinez's phone records did not show any such calls. Garza, furthermore lacked any receipts proving they occurred.

The government's evidence, however, was nevertheless sufficient to prove the international phone calls. Credibility determinations are the exclusive province of the jury, *United States v. Ruiz*, 987 F.2d 243, 250 (5th Cir.1993), and the jury is entitled to choose among reasonable constructions of the evidence. *United States v.*

Thompson, 130 F.3d 676, 685-86 (5th Cir.1997). As already explained, we read that evidence in the light most favorable to the jury verdict. *Grossman*, 117 F.3d at 258.[5] Here, Garza provided a reasonable explanation for why the calls were not collect. Given his language difficulties, some confusion during the interview with Church would be expected. Finally, Garza's lack of a receipt for these calls five years, or even five minutes, after they were made is not surprising. The conclusion that the calls were made, therefore, is legally supportable. It is not our province to become embroiled in a credibility debate between Church and Garza.

Second, Cisneros contends that the evidence did not establish that the international calls were "in furtherance" of the murder-for-hire. In other words, Cisneros argues that there was not a sufficient nexus between the foreign telephone calls and the murder scheme to violate the federal murder- for-hire statute.[6] She draws the support for her argument from the First Circuit's decision in *United States v. Houlihan*, 92 F.3d

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[5] This is true even when the jury reaches a general verdict based on two alternative theories. *See Griffin v. United States*, 502 U.S. 46, 49-51, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)(holding the jury verdict valid in this situation); *United States v. Powers*, 168 F.3d 741, 746 (5th Cir.1999)(evaluating sufficiency of the evidence with deference).

[6] There was some confusion in Cisneros's original brief about whether "in furtherance" related to causation, intent, or to the nexus between use of the facility and the underlying crime. Cisneros only clarified this argument in her motion for rehearing. As we now understand it, "in furtherance" refers to the nexus between the crime and the use of the facility in foreign commerce.

1271, 1292 (1st Cir.1996), where the First Circuit panel required the use of the facility in interstate commerce to be "in furtherance" of the underlying murder scheme. That is not the standard our circuit uses, however. In cases examining the nexus requirement in the context of the Travel Act, we merely require that the use of the facility in interstate or foreign commerce – here, the telephone – "facilitated" the underlying crime or "made it easier." *United States v. Garrett*, 716 F.2d 257, 266 (5th Cir.1983), *United States v. Pecora*, 693 F.2d 421, 424 (5th Cir.1982), and *United States v. Perrin*, 580 F.2d 730, 736 (5th Cir.1978). There is no reason that the nexus requirement for § 1958 should be any different.

When we consider Cisneros's argument challenging the sufficiency of the evidence based on the appropriate standard, it does not succeed. There was sufficient evidence to establish a sufficient nexus between the use of the facility in foreign commerce and the murder scheme because the telephone calls unquestionably facilitated in arranging the murder. Without Martinez's incessant reminders during those calls, it is reasonable for a jury to have believed that Garza would not have made as serious an effort to find a hit man. In this respect, the nexus here is at least as strong as those in the Travel Act cases previously mentioned.[7]

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[7] In *Perrin*, 580 F.2d 730, the defendants had bribed an employee of a geophysical surveyor to obtain seismic data. After obtaining the data, one of the defendants made an interstate telephone call to lawfully purchase maps to make sense of that data. The court held that the interstate nexus to the underlying crime was sufficient in that case. *Id.* at 736.

Cisneros's contention that Garza's lie during the telephone conversation – that he had already found someone to commit the murder – actually hindered, rather than facilitated, the murder is not persuasive. It was only Martinez's constant cajoling of Garza that prompted Garza to accelerate his efforts to find the hit men. In short, those telephone conversations facilitated Martinez's efforts in getting Garza to find them.

Because these telephone calls satisfy the interstate nexus requirement, we need not address the more complicated issue, the car travel between Mexico and Texas.

II

Cisneros raises several other arguments on appeal, none of which require reversal of her conviction.

A

Cisneros asks for a new trial based upon two instances of the government eliciting testimony about

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Similarly, in *Pecora*, 693 F.2d 421, a single interstate phone call again satisfied the interstate nexus by "facilitat[ing]" a bribery scheme. There had already been numerous discussions about payoffs and even one $9,000 payoff during the course of the scheme. During that interstate call, all that occurred was that the details of the scheme were further discussed. But the court held that this was enough to meet the interstate nexus hurdle, and that there was no exception for cases where the interstate nature of the call was fortuitous and incidental. *Id.* at 424. Finally, in *Garrett*, 716 F.2d at 266, a call requesting funds for a bribery scheme "facilitated" and made the bribery scheme "easier," thereby constituting a sufficient interstate nexus.

state court proceedings related to the murder. The trial court had issued an order that prohibited eliciting testimony that Cisneros had been tried for the offense in state court.

First, it is true that the government improperly elicited testimony in violation of the order:

> Q: Do you remember what you charged him [Garza] with?
>
> A: Yes, sir.
>
> Q: What was that?
>
> A: Capital Murder.
>
> Q: The same charge that you had charged Maria Martinez and Dora Cisneros with?
>
> A: Yes, sir.

Defense counsel immediately moved for a mistrial, which the trial court denied.

We will not reverse the court's denial because it was not an abuse of discretion. *United States v. Krout*, 56 F.3d 643, 647 (5th Cir.1995). "A new trial is required only if there is a 'significant possibility' that the prejudicial evidence had a 'significant impact' upon the jury verdict, viewed in light of the entire record." *United States v. Layne*, 43 F.3d 127, 134 (5th Cir.1995). Simply stated, in a trial lasting seven days, any prejudicial effect from this interchange is not enough to justify a mistrial. The government spent almost five-and-a-half days presenting a thorough case-in- chief. The defense, on the other hand,

used half a day to present its case.[8] With such a gross imbalance of evidence in favor of the government, it is hard to believe that the brief interchange above had any impact on the jury's decision. Denial of a mistrial was not an abuse of discretion.

Second, the government elicited testimony six days after this interchange that Garza had been convicted of capital murder in the Fischer homicide. Defense counsel objected, and the trial court overruled the objection. Cisneros now charges that the government tried to get the jury to infer that since Garza and Cisneros were both charged, and since Garza was convicted, that Cisneros was also tried in state court.

The admission of this testimony was not an abuse of discretion, since there was no chance of any "significant impact" on the jury verdict. *United States v. Morgan,* 117 F.3d 849, 861 (5th Cir.1997); *Layne,* 43 F.3d at 134. By itself, this testimony did not violate the district court's order. The defense can only take issue with the testimony by tying it to the earlier testimony about charges against Cisneros. There is no reason to believe that the jury drew such a connection to conclude that Cisneros had also been convicted. The government had good reason, moreover, to ask Garza about his conviction. The prosecutors wanted to minimize the effectiveness of any cross-examination about the deal they had given him.

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[8] The seventh day was spent on closing argument and jury instruction.

B

Cisneros next objects to denial of five of her proposed jury instructions. We review refusal to include requested instructions for an abuse of discretion. *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir.1994). Defendants are entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in their favor, *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). But refusal to include a requested instruction is reversible error only if the requested instruction is substantially correct, the actual charge given the jury did not substantially cover the content of the proposed instruction, and the omission of the proposed instruction would seriously impair the defendant's ability to present a defense. *United States v. Pettigrew*, 77 F.3d 1500, 1510 (5th Cir.1996).

Cisneros first sought to instruct the jury that the use of the facility in foreign commerce had to have been "in furtherance" of the murder-for-hire. As we have previously observed, "in furtherance" is not the requirement in this circuit; "facilitated" or "made easier" is. *Garrett*, 716 F.2d at 266. That is, Garza's calls need not have been made for the purpose of furthering the murder-for-hire. It is enough that those calls facilitated the scheme incidentally, or by mere happenstance. *Id.* at 265-66.

Here, it may well be true that Garza did not place the calls "in furtherance" of the murder-for-hire scheme. He called Martinez for marital advice. Martinez was the one who would bring up the subject of the Fischer murder. But those international calls gave Martinez the opportunity to pursue her earlier requests that Garza arrange

the murder. In that sense, they facilitated the murder, even though the use of the telephone across national boundaries was purely incidental. The difference between "in furtherance" and "facilitated," therefore, can be significant. For that reason, Cisneros's proposed instruction was not substantially correct, and the district court's failure to give it does not constitute reversible error. *United States v. Pettigrew*, 77 F.3d 1500, 1510 (5th Cir.1996).[9]

Cisneros's second proposal was a "theory of the defense" instruction. What she requested was essentially an extended instruction on the government's burden of proof. Since the district court repeatedly emphasized that the government carried that burden, its instruction covered Cisneros's desired instruction. Moreover, the court's refusal did not hinder Cisneros's presentation of a defense in any way.

Part of Cisneros's "theory of the defense" instruction did go beyond restatement of the burden of proof. It set forth Cisneros's position that any of Pizana's travel in foreign commerce on March 2 was related to the stolen vehicle or drug businesses, not the murder-for-hire. It also explained that Cisneros believed any of Garza's calls to Martinez were made for the purpose of discussing his marital difficulties. Since these represent mere "judicially narrated accounts" of Cisneros's facts, their submission to the jury was unnecessary. *See Pettigrew*, 77 F.3d at 1514.

Cisneros's third proposed instruction sought to limit the jury's consideration of tape-recorded conversations

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[9] We note that the district court gave no instruction on the nexus requirement.

between Garza and Martinez and between Martinez and Cisneros.[10] When the government offered those tapes into evidence, however, Cisneros's counsel failed to object properly:

> THE COURT: Any objection to the admission of the tapes?
>
> MR. CANALES: No.
>
> . . .
>
> MR. CANALES: Multiple purposes of impeachment, I understand.
>
> MR. MOSBACKER: No, Your Honor. They are being offered for purposes of rehabilitation of the witness and also for completeness of the conversations.
>
> THE COURT: There being no objections, all [the tapes] are admitted into evidence.

Assuming that some portion of the tapes included hearsay, Cisneros did not raise a timely objection to its admission. She is required to do so under Fed.R.Evid. 103(a)(1). *United States v. Wake*, 948 F.2d 1422, 1435 (5th Cir.1991). Without such an objection, we review for plain error. *Id.* The admission of this evidence, to the extent it was erroneous, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, especially since it was the defendant who first alluded to portions of the tapes. *See United States v. Olano*, 507 U.S. 725, 731-36, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

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[10] These conversations related to the purpose behind money transfers between Garza, Martinez, and Cisneros.

Cisneros's fourth requested instruction was an explanation of "causation":

> A person "causes" another to travel in foreign commerce or to use facilities in foreign commerce if he does an act with knowledge that the foreign travel or use of facilities in foreign commerce will follow in the ordinary course of business, or where such foreign travel or use of facilities in foreign commerce can reasonably be foreseen, even though not actually intended.

Although this instruction is loosely based on the causation requirement for violation of the federal mail fraud statute, *see United States v. Sneed*, 63 F.3d 381, 385 n. 4 (5th Cir.1995), the district court did not abuse its discretion in rejecting the instruction. First, we note that the source was, to be sure, from a different statute. Second, and more importantly, Cisneros's version is simply incorrect. One problem is that it confuses intent with causation: " . . . if he does an act *with knowledge* that the . . . use of the facilities in foreign commerce will follow." Yet, even more significantly, the instruction requires that the *specific* use of the facility in interstate travel that actually occurred must have been foreseeable: "where *such* foreign travel or use of facilities in foreign commerce can reasonably be foreseen." That is not what is required by the simple causation element. Consequently, her proposed instruction was not substantially correct, and the failure to give it does not constitute an abuse of discretion.[11]

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[11] Again, we note that the district court failed to give an instruction explaining the notion of causation to the jury. Instead, the one it gave related to the *mens rea* requirement with respect to causation. The reason for this instruction instead of

Cisneros's fifth instruction concerned the five- year statute of limitations. Its omission did not impair Cisneros's ability to present a defense because there was no defense under the statute of limitations. It is well recognized that the time period begins to run when the crime is complete. *Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). And one of the elements of the federal murder-for-hire offense is receipt of pecuniary value or a promise or agreement to pay. 18 U.S.C. § 1958. *Accord United States v. Finley*, 175 F.3d 645, 646 (8th Cir.1999); *United States v. Sanchez*, 3 F.3d 366, 367 (11th Cir.1993).[12]

In this case, Cisneros's indictment charged her with "caus[ing] another to . . . use a facility in foreign commerce . . . with the intent that the murder of Albert Joseph (Joey) Fischer, Jr. be committed . . . as consideration for a promise and agreement to pay, *and the receipt of, $3,000.*" The crime, as charged and tried by the government, was complete upon the receipt of the $3,000 payment. The government presented uncontroverted testimony that Martinez paid Garza $3,000 on the day of the murder, March 3, 1993. Cisneros was indicted less than five years

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one explaining causation can be attributed, at least in part, to the confusion in Cisneros's proposed instruction, which mixed the two together. This confusion continued to appear in Cisneros's briefs to this court.

[12] This conclusion is consistent with our decision in *Thompson*, 130 F.3d 676. In that case, payment occurred simultaneously with use of the facility in interstate commerce – payment was sent by mail. Thus, both elements of the offense were met at the same time and completed the offense.

later, on February 23, 1998. The statute of limitations, therefore, was not a defense available to Cisneros.[13]

C

Cisneros's next argument, that the district court erred in admitting the evidence of Fischer's murder under Fed.R.Evid. 403, is foreclosed by *United States v. Hall*, 152 F.3d 381, 400-03 (5th Cir.), *cert. denied*, 526 U.S. 1117, 119 S.Ct. 1767, 143 L.Ed.2d 797 (1999). Contrary to Cisneros's assertion, her offer to stipulate to the shooting of Fischer did not reduce the probative value of evidence of how Fischer's parents found their son, the pathologist's testimony about Fischer's autopsy, or the photographs of Fischer's corpse. This testimony and these pictures were not more gruesome or more disturbing than those admitted in *Hall* or the cases cited therein. *See Hall*, 152 F.3d at

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[13] Cisneros's additional contention, that evidence of the foreign calls fell outside the statute of limitations, is meritless: The statute of limitations is a defense to prosecution, not a rule of evidence. Therefore, once prosecution is timely instituted, the statute of limitations has no bearing on the admissibility of evidence. It would be a bizarre result indeed if a crime properly prosecuted within the limitations period could not be proven because an essential element, such as intent, could only be established by proof of incidents occurring outside the period. *United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir.1975). In addition, elements of a continuing offense, such as we have here, may fall outside the statute of limitations period without running afoul of the statute of limitations. *United States v. Bustamante*, 45 F.3d 933, 942 (5th Cir.1995).

401 (citations omitted). The probative value of the challenged evidence, therefore, was not substantially outweighed by the danger of unfair prejudice. *See id.* (citations omitted).[14]

D

We also reject Cisneros's argument that the conviction should be reversed because the district court failed to maintain an appearance of impartiality in its questioning of witnesses and comments made during the trial. First, Cisneros contends that in questioning Garza, the district court made the government's case instead of merely clarifying the evidence. Second, Cisneros maintains that the district court unfairly assisted the government in overcoming objections. One was a hearsay objection to a police officer's testimony about Ramiro Moya's involvement in Fischer's murder, and the other was an objection to the form of the question asking Moreno about Cuellar's state of mind after Palomares telephoned to report the murder. Third, Cisneros argues that the court's treatment of defense counsel exhibited favoritism in front of the jury.

After reviewing the transcript, we cannot conclude that the district court's behavior was so "prejudicial that it denied the defendant a fair, as opposed to a perfect trial." *United States v. Bermea*, 30 F.3d 1539, 1569 (5th

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[14] Cisneros's reliance on *Old Chief v. United States*, 519 U.S. 172, 183 n. 7, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) is misplaced. The Supreme Court expressly noted that its holding was limited to cases involving proof of felon status. *Old Chief*, 519 U.S. at 183 n. 7, 117 S.Ct. 644.

Cir.1994) (citations omitted). The questions to the witnesses, periodic assistance to government counsel, and occasional chastisement of defense counsel did not make the trial unfair.

The first issue is the court's questioning of witnesses. During trial, Garza explained that he had called Martinez from San Fernando, 100 miles south of the Rio Grande. The district court interjected and asked Garza if San Fernando was located in Mexico and whether he had talked to Martinez from Mexico. Garza answered both questions affirmatively. The court also asked Garza whether he and Martinez had discussed "something else" beyond his marital problems when he called her from Mexico. Garza replied that the two had discussed whether he had found the "guys [that] she [Martinez] wanted to cause harm to this boy."

Garza later testified that he met Olivarez in Dallas to tell him about "a lady in Brownsville who had . . . $3000.00 to beat up or kill this person." Garza then said he provided a picture and address to help Olivarez identify Fischer. The district court immediately asked Garza whether he had the picture during his initial conversation with Olivarez in Dallas. The court also asked Garza whether Olivarez agreed during the meeting to commit the murder. Garza answered "whenever they would go to Brownsville."

The district court's questions did not deny Cisneros a fair trial. A trial court has the discretion to clarify testimony, even if that elicits facts harmful to the defendant. *United States v. Saenz,* 134 F.3d 697, 708 (5th Cir.1998) (citations omitted). The district court may also bring out

new facts through its questioning. *United States v. Cantu*, 167 F.3d 198, 202 (5th Cir.1999), *cert. denied*, 528 U.S. 818, 120 S.Ct. 58, 145 L.Ed.2d 50 (1999) (citations omitted). The trial court stayed within these limits. Garza was a difficult witness to understand because of problems with English. The court's questions were designed to clarify his vague, confusing, and often incomplete statements.

The record further establishes that the court's assistance in overcoming Cisneros's objections did not exhibit bias in the government's favor. In both instances, the district court merely instructed prosecutors to rephrase their questions. The district court properly controlled the tempo of the trial so as to avoid repetitious objections and to keep the proceeding moving forward. *See Bermea*, 30 F.3d at 1570-71.

Finally, Cisneros points to several instances where the court treated defense counsel with less than perfect courtesy. Having examined the transcript, these do not go beyond acceptable courtroom behavior, especially in the face of some of defense counsel's antics.

In sum, we find that the district court's intervention in the trial hardly rises to the level we found objectionable in *Saenz*, 134 F.3d at 713- 14. Indeed, nothing in the district court's questions or comments "could have led the jury to a predisposition of guilt by improperly confusing the functions of the judge and the prosecutor." *Bermea*, 30 F.3d at 1569 (citing *United States v. Samak*, 7 F.3d 1196, 1197-98 (5th Cir.1993)).

The district court, moreover, twice instructed the jury regarding the court's participation in the trial. We have previously held that curative instructions such as this one

ameliorate potential prejudicial effect of a district court's comments or questions. *See Bermea*, 30 F.3d at 1571-72 (citations omitted). At the beginning of the trial as well as at the close of the evidence, the district court explained to the jury that it did not have an opinion about the case, and to disregard any statements that might indicate otherwise. The court then charged the jury not to give the court's question more or less weight than those of the lawyers.

E

Finally, the district court did not abuse its discretion in admitting Moreno's testimony under the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E). Cisneros argues that assuming *arguendo* there existed a conspiracy to kill Fischer, the admission of Moreno's testimony under the co-conspirator exception was in error because Moreno had no involvement in the murder. We find this argument frivolous.

Moreno testified that he and Garza were both employed in Cuellar's organization and that Palomares and Olivarez acted as hit men for the organization. Moreno also acknowledged that because he was a member of Cuellar's crime family,[15] Cuellar told him about conversations with Garza concerning the "Brownsville murder." In early February 1993, Moreno accompanied Garza to a Dallas gun shop where Garza bought a .38 Super – the same type of pistol as the one used to shoot

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[15] Moreno was an enforcer for Cuellar. He picked up drug money and delivered drugs to Cuellar's stash houses.

Fischer. The record further shows that Moreno gave Garza the purchase money, which had been supplied by Cuellar. Immediately after the sale, Moreno took possession of the weapon and delivered it to Cuellar that same day. Moreno later overheard a conversation between Palomares and Cuellar, during which Palomares stated that he had killed a person in Brownsville. Finally, Moreno stated that Palomares, Pizana, and Olivarez were involved in the "Brownsville murder" and that the murder was committed because of a contract Garza made with "a certain person."

The government met its burden of proving the co-conspirator exception to the hearsay rule by a preponderance of the evidence. *See United States v. Narviz-Guerra*, 148 F.3d 530, 536 (5th Cir.), *cert. denied*, 525 U.S. 1046, 119 S.Ct. 601, 142 L.Ed.2d 543 (1998); *United States v. Ruiz*, 987 F.2d 243, 247 (5th Cir.), *cert. denied*, 510 U.S. 855, 114 S.Ct. 163, 126 L.Ed.2d 123 (1993). Moreno was integrally involved in the operations of Cuellar's organization, the one that planned and executed Fischer's murder.

III

For the reasons stated herein, Cisneros's conviction is in all respects

AFFIRMED.

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Dora Garcia CISNEROS, Defendant-Appellant.

No. 98-40955.

Feb. 24, 2000.

James Lee Turner (argued), Paula Camille Offenhauser, Asst. U.S. Atty., Houston, TX, for Plaintiff-Appellee.

David L. Botsford (argued), Austin, TX, J.A. Canales, Jo Ellen Hewins, Canales & Simonson, Corpus Christi, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas; Filemon B. Vela, Judge.

(Opinion Oct. 28, 1999, 5 Cir., 1999, 194 F.3d 626)

(Opinion on Panel Rehearing, Feb. 3, 2000, 5 Cir., 2000, 203 F.3d 333)

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

BY THE COURT:

A majority of the judges in active service having determined, on the court's own motion, to rehear this case en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed,

IT IS FURTHER ORDERED that this cause shall be consolidated for purposes of briefing and argument with No. 98-40568, United States of America vs. Betty Louise Marek. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Betty Louise MAREK, Defendant-Appellant.
United States of America, Plaintiff-Appellee,

v.

Dora Garcia Cisneros, Defendant-Appellant.

Nos. 98-40568, 98-40955.

Jan. 4, 2001.

E. Grady Jolly, Circuit Judge, dissented in an opinion, in which Edith H. Jones, Jerry E. Smith, Barksdale and DeMoss, Circuit Judges, joined.

Kathlyn Giannaula Snyder (argued), James Lee Turner, Asst. U.S. Atty., Houston, TX, for Plaintiff-Appellee.

Roland E. Dahlin, II, Fed. Public Defender, Renata Ann Gowie, Asst. Fed. Public Defender (argued), Houston, TX, for Betty Louise Marek.

David L. Botsford (argued), Sheinfeld, Maley & Kay, Austin, TX, J.A. Canales, Jo Ellen Hewins, Canales & Simonson, Corpus Christi, TX, for Dora Garcia Cisneros.

Appeals from the United States District Court for the Southern District of Texas.

Before REYNALDO G. GARZA, POLITZ, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS,

BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.*

WIENER, Circuit Judge:

According to its title, the federal murder-for-hire statute, 18 U.S.C. § 1958 ("§ 1958"), criminalizes the "[u]se of *interstate commerce facilities* in the commission of murder-for-hire."[1] The statute proscribes paying another to commit murder, but only when the defendant either (1) "travels in or causes another (including the intended victim) to travel in interstate or foreign commerce," or (2) "uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce."[2] Both of the instant cases concern only the second prong of § 1958's jurisdictional element, the *use* of an interstate (or foreign) commerce facility.

In *United States v. Cisneros*,[3] a panel of this court suggested in *dicta* that, to satisfy the jurisdictional element, a facility must be used in an *inter* state fashion, i.e., that *intra* state use of a facility would not suffice, even though that facility is one that generally is an interstate commerce facility. In contrast, a divided panel of this court held, in *United States v. Marek*,[4] that wholly *intra* state use of a facility that is an interstate commerce

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* Chief Judge King did not participate in this decision.

[1] Emphasis added.

[2] 18 U.S.C. § 1958.

[3] 203 F.3d 333 (5th Cir.2000), *vacating* 194 F.3d 626 (5th Cir.1999).

[4] 198 F.3d 532 (5th Cir.1999), *reh'g granted*, 206 F.3d 449 (5th Cir.2000).

facility is sufficient to satisfy § 1958's jurisdictional element.[5] The *Marek* majority acknowledged *Cisneros* but reasoned that it was not binding because, in furtherance of her murder-for-hire scheme, Cisneros had caused international telephone calls to be made, an activity that indisputably satisfied the jurisdictional element even if Marek's wholly *intra* state communication might not. Thus, the portion of *Cisneros* that suggests that § 1958's application is limited to *interstate* use of an interstate commerce communication facility is *dicta*.[6]

To reconcile these differences and announce a consistent position for this Circuit, we voted to rehear both cases en banc,[7] which had the collateral effect of vacating both panel decisions. We now adopt the position taken by the panel majority in *Marek* and hold that § 1958's *use* of a "facility in interstate commerce" is synonymous with the use of an "interstate commerce facility" and satisfies the jurisdictional element of that federal murder-for-hire statute, irrespective of whether the particular transaction in question is itself *inter* state or wholly *intra* state.

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[5] *Id.* at 538.

[6] *Id.* at 534 & n. 1.

[7] 206 F.3d 448, 448-49 (5th Cir.2000).

I.

FACTS AND PROCEEDINGS

A. *Marek*

The facts are not in dispute. Defendant-Appellant Betty Louise Marek pleaded guilty to paying an undercover FBI agent, who was posing as a hit-man, to murder her boyfriend's paramour. Marek was arrested after she used Western Union to transfer $500 to the putative hit-man. Marek initiated the wire transfer in Houston, Texas, and it was received in Harlingen, Texas. The government introduced no evidence to show that the Western Union transmission actually crossed the Texas state line en route from Houston to Harlingen, so we must assume that it did not.[8]

After the district court had accepted Marek's guilty plea and subsequently sentenced her, she appealed her conviction, urging that the district court erred when it found that she had admitted to facts that satisfied each

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[8] As described in a recent Fifth Circuit case, however, the Western Union procedure for wiring money from one Texas city to another (in that case, from Lufkin to Beaumont) required Western Union agents in both cities to call the company's main computer in Bridgeton, Missouri. *See United States v. Brumley*, 79 F.3d 1430, 1432-33 (5th Cir.1996), *rev'd on other grounds en banc*, 116 F.3d 728, 731 (5th Cir.1997) (affirming convictions and noting that the wire transfers "were accomplished electronically through a Western Union facility located outside of Texas"); *see also United States v. Davila*, 592 F.2d 1261, 1263 (5th Cir.1979) (upholding wire fraud conviction under 18 U.S.C. § 1343 of defendant who used Western Union to send money between San Antonio and McAllen when all wire transfers were routed through Middletown, Virginia).

legal element of the crime charged. Convinced that Western Union is "a facility in interstate commerce," and that this phrase is synonymous with "interstate commerce facility," a divided panel of this court affirmed her conviction, holding that Marek's wholly *intra* state use of Western Union was sufficient to satisfy the jurisdictional element of § 1958.[9]

B. *Cisneros*

The relevant facts in *Cisneros* also are undisputed at this juncture. Doris Cisneros wanted to have her daughter's erstwhile boyfriend killed. Cisneros told this to her fortune teller and asked if the seer would find someone to commit the murder for a price. Acting as Cisneros's agent, the clairvoyant – through another client – ultimately located and employed two hit-men for Cisneros. In doing so the oracle placed and received international phone calls between Texas and Mexico. The hit-men traveled from Mexico to Brownsville, Texas, where they shot and killed Cisneros's intended victim.[10] A jury convicted Cisneros, and she appealed.

A panel of this court concluded that a reasonable jury could have found that (1) the fortune teller had participated in international telephone calls as Cisneros's agent, and (2) those calls were sufficiently connected to the

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[9] The facts are set forth more fully in the panel majority's opinion. *Marek*, 198 F.3d at 533.

[10] The facts are set forth more fully in the panel opinion. *Cisneros*, 203 F.3d at 337-39.

murder to be "in furtherance" of that crime.[11] The panel therefore affirmed Cisneros's conviction.

A crucial factual distinction between *Marek* and *Cisneros* exists: In *Cisneros* the subject telephone calls were unquestionably international so the *use* of the telephone facility was international ("foreign"), as is the telephone facility itself; in *Marek*, however, there was only an *intra* state communication (a wire transfer of funds between two Texas cities), albeit the communication facility, Western Union, is an interstate commerce facility. Therefore, to affirm *Marek* we must conclude that § 1958 reaches *intra* state use of a facility in interstate commerce. In *Cisneros*, on the other hand, even if we assume *arguendo* that the statute should be accorded the narrowest interpretation possible, we must affirm Cisneros's conviction on the strength of the international (foreign) telephone calls.

II.

STANDARDS OF REVIEW

Cisneros was convicted by a jury. If, after viewing the evidence and all reasonable inferences in the light most favorable to the verdict, we conclude that a rational trier of fact could find that the government proved each essential element of the crime of conviction beyond a reasonable doubt, we must affirm.[12]

Marek, in contrast, pleaded guilty. We review guilty pleas for compliance with Rule 11 of the Federal Rules of

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[11] *Id.* at 343-45.

[12] *Cisneros*, 203 F.3d at 343 (citing *United States v. Grossman*, 117 F.3d 255, 258 (5th Cir.1997)).

Criminal Procedure. Here, the determinative question is whether there is an adequate factual basis in the record from which the district court could conclude as a matter of law that Marek's conduct satisfies each element of § 1958. That Marek pleaded guilty – a legal conclusion on her part – ostensibly admitting to discrete facts supporting the charge against her, is not itself sufficient to support her guilty plea.[13] Subsection (f) of Rule 11 requires the district court to determine that the *factual* conduct to which the defendant admits is sufficient *as a matter of law* to constitute a violation of the statute.[14] Rule 11(f) reads:

> *(f) Determining accuracy of plea.* Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The Supreme Court has explained that this requirement – mandating that the district court compare (1) the conduct to which the defendant admits with (2) the elements of the offense charged in the indictment or information – "is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge *but without realizing that his conduct does not actually fall within the charge.*' "[15] Implicit in the district court's acceptance of Marek's plea of guilty, then, was its determination that her admitted conduct

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[13] *United States v. Briggs*, 939 F.2d 222, 227-28 (5th Cir.1991); *United States v. Oberski*, 734 F.2d 1030, 1031 (5th Cir.1984).

[14] *Briggs*, 939 F.2d at 227-28.

[15] *McCarthy v. United States*, 394 U.S. 459, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (quoting Fed.R.Crim.P. 11, Notes of Advisory Committee on Criminal Rules) (emphasis added).

satisfies every legal element of the federal murder-for-hire statute.

Marek did not raise a challenge to the adequacy of the factual basis underlying her guilty plea in the district court, either by making her plea conditional pursuant to Rule 11(a)(2) or by objecting thereafter, such as at her sentencing. Rather, she raised it for the first time on appeal. We have repeatedly held that when a defendant, for the first time on appeal, presents a straightforward issue of law – here, whether the undisputed factual basis is sufficient as a matter of law to sustain the guilty plea – we will review that issue for plain error.[16]

Plain error review requires the appellant to show (1) there is an error, (2) that is clear and obvious, and (3) that affects his substantial rights.[17] If these factors are established, the decision to correct the forfeited error still lies within our sound discretion, which we will not exercise unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.[18]

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[16] *United States v. Angeles-Mascote*, 206 F.3d 529, 530 (5th Cir.2000); *see also United States v. Johnson*, 194 F.3d 657, 660 (5th Cir.1999), *vacated on other grounds*, ___ U.S. ___, 120 S.Ct. 2193, ___ L.Ed.2d ___ (2000); *United States v. Ulloa*, 94 F.3d 949, 951-54 (5th Cir.1996); *United States v. Knowles*, 29 F.3d 947, 950-51 (5th Cir.1994).

[17] *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir.1994) (en banc) (citing *United States v. Olano*, 507 U.S. 725, 730-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)), *abrogated in part on other grounds, Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

[18] *Olano*, 507 U.S. at 735-36, 113 S.Ct. 1770.

The first of the three facets of plain error that we must address is whether there was error. To answer this threshold question when Rule 11(f) is implicated, we must examine, parse, and interpret § 1958, the criminal statute under which Marek was convicted of murder-for-hire. Only by determining the elements of that crime and comparing each element to the facts admitted by Marek, as set forth in the factual basis during the plea colloquy, can we determine if there was error *vel non*.

III.

STATUTORY CONSTRUCTION

In Marek's case we must ask whether, for purposes of satisfying the jurisdictional element of the federal murder-for-hire statute, it is sufficient that the defendant used an interstate commerce facility in an *intra* state fashion. Asked differently, is it necessary that both (1) the facility *and* (2) the defendant's use of that facility be in interstate or foreign commerce? To answer this question, we will look first to the plain language of the statute and second to its statutory context.

A. *Statutory Language*

§ 1958. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, *or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce,* with intent that a murder be committed in

violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined [or imprisoned] under this title[.]

(b) As used in this section and section 1959 –

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) *"facility of interstate commerce"* includes means of *transportation* and *communication;* and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.[19]

As is patent on the face of the statute, this crime can be committed by engaging in either of two distinct activities: (1) *travel* or (2) *use*. If, in *Marek* or *Cisneros* (or both), the jurisdictional element was satisfied, it must have been under the use prong, as the travel prong is nowhere implicated.[20] The travel and use prongs are distinguishable by the divergent natures of the two activities: *Travel* requires the physical movement of a person, such as by

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[19] 18 U.S.C. § 1958 (emphasis added).

[20] The record in *Cisneros* reveals that the hit-men traveled from Mexico to Texas to perform the murder-for-hire. The panel concluded that the jurisdictional element was satisfied by the international telephone calls and thus did not consider if the jurisdictional element was satisfied by international travel. *Cisneros*, 203 F.3d at 345. We do the same.

walking, running, or riding in or on a bike, car, wagon, train, bus, or airplane; in contrast, *use* contemplates a perpetrator who remains essentially stationary while causing an inanimate object to be (1) communicated (e.g., a letter, telegram, or money order) or (2) transported (e.g., a gun, a bomb, or cash).[21] The statute's definition of travel never mentions the facility; presumably a perpetrator could violate the travel prong on foot, using no "facility" at all, as, for example, by hiking cross-country to deliver the blood money.

The key question of statutory construction presented in *Marek* is whether, under the use prong of § 1958, the phrase "in interstate or foreign commerce" modifies "use" or modifies "facility." Purely from a structural viewpoint, we must conclude that "in interstate or foreign commerce" is an adjective phrase that modifies "facility," the noun that immediately precedes it – *not* an adverbial phrase that modifies the syntactically more remote verb, "[to] use." We see the former conclusion as the more natural and sensible reading of the relevant portion of the statute. Primarily because of the proximity of "in interstate or foreign commerce" to "facility," the word which that phrase modifies is facility and not use. A contrary conclusion – that "in interstate or foreign commerce" modifies "use" – would require a strained structural interpretation of the statute.[22]

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[21] *See* 18 U.S.C. § 1958(b)(2) (stating that " 'facility of interstate commerce' includes means of transportation and communication").

[22] The dissent argues that the statute's drafters need have resorted to an unduly awkward grammatical construction to

B. *Statutory Context*

When it adopted § 1958, Congress was acting within the second of three broad categories identified by the Supreme Court in *United States v. Lopez*[23] as conduct appropriately subject to regulation under the Commerce Clause.[24] Of the second category, the Court wrote that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, *even though the threat may come only from intrastate activities.*"[25] When Congress

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modify "in interstate or foreign commerce" with "use." Were that Congress's intention, however, the statute could have been phrased smoothly several different ways: To criminalize any use of the mail but only interstate use of other facilities, for example, the drafters could have targeted "interstate use of a facility or use of the mail with intent that a murder be committed." To further narrow the statute and criminalize only interstate use of the mail or any other facility, one possible phrasing would be "interstate use of a facility or the mail with intent that a murder be committed." Congress knows how to write this requirement when it so chooses. *See, e.g.*, 18 U.S.C.A. § 247(b) (formerly criminalizing damage to religious property by a defendant who "uses a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce"; amended to apply to offense that "is in or affects interstate or foreign commerce" by Church Arson Prevention Act of 1996, Pub.L. No. 104-155, § 3(3), 110 Stat. 1392 (1996)).

[23] 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

[24] U.S. Const. art. 1, § 8, cl. 3.

[25] *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624 (emphasis added). The Court cited, *inter alia*, *Shreveport Rate Cases*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (holding that the Interstate Commerce Commission could regulate intrastate railway rates

regulates and protects under the second *Lopez* category, therefore, federal jurisdiction is supplied by the nature of the instrumentality or facility[26] used, not by separate proof of interstate movement.[27] Under statutes similar to § 1958, federal jurisdiction based on *intra* state use of *inter* state facilities is an appropriate exercise of the commerce power, as this and other circuit courts repeatedly have found.

In *United States v. Heacock*,[28] this circuit concluded that the U.S. Post Office is a "facility in interstate commerce," and that intrastate mailings satisfied the jurisdictional requirement of the Travel Act.[29] Significant to our analysis today, the *Heacock* opinion alludes to the mail's unique history but never mentions Congress's postal power,[30] instead stressing the status of the mail as an interstate commerce facility:

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to protect interstate commerce), and *Southern R. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce).

[26] We find no meaningful distinction between the terms "facilities" and "instrumentalities" of interstate commerce. *Cisneros*, 203 F.3d at 340 n. 4.

[27] *See* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L.Rev. 435, 471 (1995).

[28] 31 F.3d 249, 255 (5th Cir.1994).

[29] 18 U.S.C. § 1952. We have previously held that it is appropriate to interpret § 1958 in light of § 1952 given that the two sections employ similar language, and that § 1958 was intended to supplement § 1952. *United States v. Edelman*, 873 F.2d 791, 794 (5th Cir.1989).

[30] U.S. Const. art. 1, § 8, cl. 7.

> In other words, whenever a person uses the United States Post Office to deposit, to transport, and to deliver parcels, money, or other material by means of the mail, that person clearly and unmistakably has used a "facility in interstate commerce," irrespective of the intrastate destination of the item mailed.[31]

Congress had made the sufficiency of intrastate mailings plain in a 1990 amendment entitled "Clarification of applicability of 18 U.S.C.1952 to all mailings in furtherance of unlawful activity."[32] The amendment changed § 1952's wording slightly to mirror that of § 1958, targeting "[w]hoever travels in interstate or foreign commerce

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[31] *Heacock*, 31 F.3d at 255. The dissent argues that our *Heacock* decision was based on the Second Circuit's reasoning in *United States v. Riccardelli*, 794 F.2d 829 (2d Cir.1986), that the mail is a "special case, separate and distinct from 'facilities in interstate or foreign commerce.' " While it is undoubtedly true that the mail is a "special case," the *Riccardelli* analysis that we actually quoted in *Heacock* – reproduced here in its entirety – does not support the dissent's inference: " 'The positioning of the phrase "including the mail" in the statute singles out the mail for special treatment and thus consistent with the historical understanding of the United States mail, *equates the use of the mail with the use of other facilities of interstate and foreign commerce;* it does not indicate that the mailing itself must be interstate.' " *Heacock*, 31 F.3d at 255 (quoting *Riccardelli*, 794 F.2d at 831) (emphasis added).

[32] Crime Control Act of 1990, Pub.L. No. 101-647, § 1604, 104 Stat. 4789, 4843 (1990); *see also Krantz v. United States*, 1999 WL 557524, at *4 (E.D.N.Y.1999), *appeal dismissed*, 224 F.3d 125 (2d Cir.2000). The amendment was passed a year after the Sixth Circuit held in *United States v. Barry*, 888 F.2d 1092 (6th Cir.1989), that only interstate use of the mail satisfied § 1952's jurisdictional nexus. The Second Circuit earlier had decided the opposite in *Riccardelli*.

or uses the mail or any facility in interstate or foreign commerce."[33] As Congress thus expressly made clear that § 1952 applies to intrastate mailings, and did so by importing § 1958's wording into § 1952, logic dictates that precisely the same wording in § 1958 must apply equally to intrastate use of other interstate facilities, such as Western Union.

In a similar vein, through passage of a 1994 amendment to the federal mail fraud statute, Congress expanded 18 U.S.C. § 1341 to reach private interstate commercial carriers, such as Emery, DHL, and Federal Express, in addition to the U.S. Postal Service. Although no circuit court has addressed whether that amendment requires the crossing of state lines to establish jurisdiction, one district court recently held that the amended statute does cover "purely intrastate delivery of mails by private or commercial carriers as long as those carriers engage in interstate deliveries. . . . While jurisdiction lies only under the Commerce Clause for the use of private or commercial carriers, Congress may still regulate their intrastate activities because they are instrumentalities of interstate commerce."[34] Here again, the conclusion is appropriate because intrastate use of interstate facilities is properly regulated under Congress's second-category *Lopez* power.

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[33] Before amendment, § 1952 applied to "[w]hoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail." This is the language interpreted in *Heacock*.

[34] *United States v. Photogrammetric Data Services, Inc.*, 103 F.Supp.2d 875, 882 (E.D.Va.2000).

Mail and delivery services are not the only "means of transportation and communication" amenable to congressional Commerce Clause protection under *Lopez* during wholly intrastate use. Interstate commerce facilities that have created a criminal federal jurisdictional nexus during intrastate use include telephones,[35] automobiles, [36] and airplanes.[37] Perhaps most analogous to Marek's use

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[35] *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir.1999) ("It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce."), *cert. denied*, 528 U.S. 838, 120 S.Ct. 101, 145 L.Ed.2d 85 (1999); *United States v. Gilbert*, 181 F.3d 152, 158-59 (1st Cir.1999) (finding jurisdiction under 18 U.S.C. § 844(e), concerning threats made "through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce"); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir.1997) (cellular telephones); *United States v. Houlihan*, 92 F.3d 1271, 1292 (1st Cir.1996) (assuming that telephones are facilities in interstate commerce under § 1958); *Alley v. Miramon*, 614 F.2d 1372, 1379 (5th Cir.1980) (stating, in a securities case, that the court "has consistently held that the intrastate use of the telephone may confer jurisdiction over a private action under Section 10(b) and Rule 10b-5." Rule 10b-5 supplies jurisdiction "by the use of any means or instrumentality of interstate commerce or of the mails.").

[36] *United States v. Bishop*, 66 F.3d 569, 589 (3d Cir.1995) (writing that Congress's power to criminalize intrastate carjacking "derives from the [automobiles'] status as instrumentalities"); *see also United States v. Cobb*, 144 F.3d 319, 322 (4th Cir.1998); *United States v. McHenry*, 97 F.3d 125, 126 (6th Cir.1996); *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir.1995), *rev'd on other grounds, Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

[37] *United States v. Hume*, 453 F.2d 339, 340 (5th Cir.1971) (finding that 18 U.S.C. § 32, which criminalizes damage to "civil

of Western Union are the facts of *United States v. Baker*,[38] an Eighth Circuit case holding that an interstate network of automatic teller machines ("ATMs") is a facility in interstate commerce "squarely within the literal language of the Travel Act."[39] In *Baker*, the Eighth Circuit upheld a Travel Act conviction based on an extortion victim's cash withdrawal from his local bank using another local bank's ATM.

The *Baker* court noted that, even though the transaction at issue was strictly local, customers could use the ATM network to make interstate deposits and withdrawals, and the court noted: "Though [the victim's] withdrawal triggered an entirely intrastate electronic transfer between [the two local banks], the jury found that [the defendant] caused [the victim] to use a facility in interstate commerce."[40]

The dissent notes that we are splitting with the Sixth Circuit's interpretation of § 1958 in *United States v. Weathers*,[41] in which that court found jurisdiction proper based on a defendant's in-state call using a cellular telephone that sent an interstate search signal. Although the holdings of this case and *Weathers* do not actually conflict

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aircraft used, operated, or employed in interstate, overseas, or foreign commerce," protects aircraft even while they are not actually operating interstate).

[38] 82 F.3d 273 (8th Cir.1996), *cert. denied*, 519 U.S. 1020, 117 S.Ct. 538, 136 L.Ed.2d 423 (1996).

[39] *Id.* at 276.

[40] *Id.* at 275.

[41] 169 F.3d 336 (6th Cir.1999), *cert. denied*, 528 U.S. 838, 120 S.Ct. 101, 145 L.Ed.2d 85 (1999).

with each other, it is true that our reasoning does. As noted above,[42] however, the Sixth Circuit's reasoning that the use of an instrumentality *in* interstate commerce (i.e., the mail) requires the crossing of state lines was expressly [illegible] by congressional amendment of the Travel Act.[43] We did not follow that reasoning in *Heacock* and we decline to do so now, particularly given Congress's use of the very language of § 1958 we interpret today to remove any possible doubt that the Travel Act applies even to intrastate mailings.[44]

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[42] *See supra* note 32.

[43] The Sixth Circuit reasons that a statute regulating a "facility *in* interstate commerce" governs channels of interstate commerce, the first *Lopez* category, while a "facility *of* interstate commerce" falls into the second *Lopez* category, comprising the instrumentalities of interstate commerce. We conclude that the "use of facilities (*in* or *of*) interstate commerce" in violation of § 1958 falls into the second category. Because it is not necessary to this case, we do not decide whether § 1958's "travel in interstate commerce" prong refers to the channels of interstate commerce, or to *Lopez*'s second-category "persons or things in interstate commerce." *See Lopez*, 514 U.S. at 558, 115 S.Ct. 1624.

[44] The dissent, like the Sixth Circuit, would decide this case based on perceived differences in the meanings of "of" and "in." In *Dupuy v. Dupuy*, 511 F.2d 641, 642-43 (5th Cir.1975), we found significant that the Securities Act of 1933 based jurisdiction on the use of instruments *in* interstate commerce, while the Securities Exchange Act of 1934 required use of an instrumentality *of* interstate commerce. We do not contend that similarly varying phraseology never can have statutory significance; we merely conclude, based on the grammatical structure of § 1958 and the use of both phrases interchangeably in the statute and its legislative history, that Congress's particular deployment of these two prepositions in § 1958 is not dispositive of this case.

We are satisfied that when § 1958 is read as a whole and viewed in context as part of the power of Congress to regulate and protect the instrumentalities of interstate commerce, even when the threat comes from intrastate activities,[45] it becomes clear that the *facility*, not its use, is what must be "in interstate or foreign commerce." In the instant context, then, when a facility employed to advance murder-for-hire is in interstate or foreign commerce generally, the jurisdictional element of § 1958 is satisfied even though the particular *use* of the facility on the specific occasion in question is only *intra* state. Thus, both (1) Marek's intrastate use of Western Union – a quintessential facility *in* interstate commerce – to transfer funds within Texas, and (2) Cisneros's international telephone calls, are sufficient to satisfy the jurisdictional element of § 1958, and – more importantly – that jurisdictional element is present in the statute through a valid exercise of congressional Commerce Clause power under the second *Lopez* category.

As Marek's use of Western Union satisfies the jurisdictional element of the statute, the district court properly discharged its duty under Rule 11(f). Thus, there was no error. And, in the absence of an error, there obviously can be no plain error.

C. *Statutory Ambiguity*

Marek nevertheless contends that subsection (b)(2) of § 1958 – which explains that "facility of interstate commerce" includes both means of *transportation* and means

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[45] *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624.

of *communication* – introduces an ambiguity into the statute. Marek's argument goes as follows: There is an inconsistency between the statute's substantive subsection (§ 1958(a)), which uses the phrase "facility *in* interstate or foreign commerce," on the one hand, and subsection (b)(2)'s "defining" of the phrase "facility *of* interstate commerce," on the other. Marek contends that the phrase used in the substantive subsection ("facility *in* interstate commerce") implicates a more restricted class of facilities than does the phrase used in the "definitional" subsection ("facility *of* interstate commerce") because, she insists, for a facility to be *in* interstate commerce, there must be a nexus between the facility and its use in interstate commerce. In other words, in Marek's view, facilities are only *in* interstate commerce when they are employed in an interstate fashion, whereas a facility that is almost always used *in* interstate commerce (like Western Union) remains a facility *of* interstate commerce, even in instances when its use is intrastate. Given this inconsistency between the substantive provision of subsection (a) and the explanatory provisions of subsection (b)(2), urges Marek, the substantive subsection must predominate. Thus, continues Marek's argument, as her use of Western Union (which she admits is a facility *of* interstate commerce) was wholly *intra* state it was not the *use* of a facility *in* interstate commerce, even though the facility itself is an interstate commerce facility. Not surprisingly, we disagree.

First, we find the inconsistency between § 1958(a) and (b)(2) to be more apparent than real, and that use of slightly different phraseology in the clarification section ("of" rather than "in") was not intended by Congress to

limit the scope of the statute. Subsection (b)(2) does not "define" facility; rather, it merely clarifies that a facility can be a means of transportation, such as an interstate delivery service, *or* a means of communication, such as a telegraph or telephone network. As the travel prong of the statute never mentions "facility," subsection (b)(2) applies only to the use prong, merely clarifying that it covers the sending of *things* as well as *messages*. For example, sending a bomb from Houston to Harlingen via UPS would involve *transportation* because a "thing" is sent, but sending a letter from Houston to Harlingen via Federal Express would involve *communication* because only a message is sent. In both instances, however, a "facility" is "used." Despite Marek's effort to create ambiguity out of whole cloth, we perceive none.

The legislative history of § 1958 is even more persuasive. A 1983 Senate Judiciary Committee report describes the offense punishable under the murder-for-hire statute as "the travel in interstate or foreign commerce or the use of the facilities of interstate or foreign commerce or of the mails, as consideration for the receipt of anything of pecuniary value, with the intent that a murder be committed."[46] The report later explains that "[t]he gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent and the offense is complete whether or not the murder is carried out or even attempted."[47] Even though the statute was not intended to usurp the

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[46] S.Rep. No. 98-225, at 304 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484.

[47] *Id.* at 306, 3485.

authority of state and local officials, the report states, "the option of Federal investigation and prosecution should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper Federal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present."[48] In a discussion of the murder-for-hire portion of the bill extending over three pages, the Senate report uses the phrase "facility [or facilities] *of* interstate commerce" four times and "facility *in* interstate commerce" only once, drawing no apparent distinction between the two. We find inescapable the conclusion that "of" and "in" were considered and used by Congress as synonyms in regards to this particular statute.

We hold today that the statute is unambiguous and clear on its face. But even if we were to assume, for argument's sake, that the statute is ambiguous, any lingering doubt regarding the statute's meaning is laid to rest by the title of the section. The title of § 1958 – "Use of interstate commerce facilities in the commission of murder-for-hire" – plainly eliminates any claim of ambiguity. The title is unambiguous and clearly employs "interstate commerce" to modify "facility," not "use." The Supreme Court has held that it is appropriate to consider the title of a statute in resolving putative ambiguities:

> Among other things which may be considered in determining the intent of the legislature is the title of the act. . . . Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and

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[48] *Id.* at 305, 3484.

> in such case the title claims a degree of notice, and will have its due share of consideration. . . . The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.[49]

More recently, the Court reiterated: "While the title of an act will not limit the plain meaning of the text, it may be of aid in resolving an ambiguity."[50] The title of § 1958 spells out the activity Congress meant to punish under the statute, eschewing ambiguity.[51]

Section 1958 employs three phrases to describe "facility" in the context of the statute: "interstate commerce facilities" in the title; "facility in interstate or foreign commerce" in subsection (a); and "facility of interstate commerce" in subsection (b)(2). A review of the statute, its legislative history, and the United States Code as a whole indicates that, at least in this statute, Congress used these terms interchangeably as synonyms.

Not to be dissuaded, Marek further contends that: (1) Even if we reject her construction of the statute in favor of the government's, we must nevertheless find that both

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[49] *Holy Trinity Church v. United States*, 143 U.S. 457, 462, 12 S.Ct. 511, 36 L.Ed. 226 (1892).

[50] *Maguire v. Commissioner of Internal Revenue*, 313 U.S. 1, 9, 61 S.Ct. 789, 85 L.Ed. 1149 (1941) (citations omitted).

[51] The text of other sections of the U.S.Code use the same terminology as that found in § 1958's title. Both 18 U.S.C.A. § 1961 and § 2516 specifically refer to § 1958 and describe § 1958 as relating to the use of "interstate commerce facilities" in the commission of murder-for-hire. Thus, the title's reference to "interstate commerce facilities" is not isolated, and cannot be presumed to be accidental.

constructions are reasonable and choose the narrower one pursuant to the rule of lenity; (2) the government's construction raises doubts about the statute's constitutionality, which must be resolved in a way that avoids potential constitutional infirmity; and (3) the federal murder-for-hire statute criminalizes conduct that is traditionally the province of state law enforcement, and Congress should not be presumed to have altered the federal-state balance unless it speaks with unmistakable clarity. We dispose of each of these contentions in turn.

1. *Rule of Lenity*

The rule of lenity – a rule of narrow construction rooted in concern for individual rights, awareness that it is the legislature and not the courts that should define criminal activity, and belief that fair warning should be accorded as to what conduct is criminal – applies when, but only when, "after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute."[52] We are convinced that this is not such a case and, under these circumstances, we will not "blindly incant the rule of lenity to 'destroy the spirit and force of the law which the legislature intended to and did enact.' "[53]

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[52] *Smith v. United States*, 508 U.S. 223, 239-40, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) (internal citations, quotations, and alterations omitted) (quoting *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (quoting *United States v. Fisher*, 2 Cranch 358, 386, 2 L.Ed. 304 (1805))).

[53] *Huddleston v. United States*, 415 U.S. 814, 832, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974) (alteration omitted) (quoting

Additionally, the rule of lenity should not be invoked here because it was no surprise to Marek that murder-for-hire is a serious crime with serious penalties. The principle behind the rule of lenity is that no one should be forced to speculate whether her conduct is prohibited.[54] It would be absurd to say that Marek did not know that her conduct – hiring an assassin to commit murder – was prohibited.

2. *Constitutional Doubt*

The rule of constitutional doubt is likewise inapplicable. Marek contends that a broad application of § 1958 to intrastate activities would violate the Tenth Amendment, compelling adoption of the narrow interpretation of the statute she advocates to save it from constitutional infirmity. For all the reasons stated above, however, the statute's requirement that a perpetrator either travel in interstate commerce or use an interstate commerce facility confirms that the statute raises no constitutional concerns, given Congress's clear constitutional authority to regulate interstate commerce. "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."[55]

American Tobacco Co. v. Werckmeister, 207 U.S. 284, 293, 28 S.Ct. 72, 52 L.Ed. 208 (1907)).

[54] *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979).

[55] *Caminetti v. United States*, 242 U.S. 470, 491, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

3. *Federal-State Balance*

Finally, Marek argues that the intention to alter the federal-state balance in this area – traditionally the province of state law enforcement – must be evidenced by unmistakable clarity. For the same reasons that we reject application of the rule of lenity – that (1) the statute is plain on its face, and (2) even if we concede for the sake of argument that there is some slight internal inconsistency in terminology, it is resolved by the statute's legislative history and title – we reject the notion that Congress has not spoken with sufficient clarity to criminalize conduct traditionally the subject of state criminal laws.

Like Marek's, the dissent's lament over the perceived trampling of states' rights misses the mark by the palpable failure to include a crucial observation: Under § 1958, federal authorities have nothing more than *concurrent* jurisdiction over the subset of murders-for-hire that bear the requisite nexus with interstate commerce. The legislative history plainly states that federal investigation and prosecution should be no more than an "option" to be "used in appropriate cases" to assist state and local authorities, and that "Federal jurisdiction should be asserted selectively based on such factors as the type of defendants reasonably believed to be involved and the relative ability of the Federal and State authorities to investigate and prosecute."[56]

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[56] S.Rep. No. 98-225, at 304-05 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484.

The records in both of these cases eschew any possibility that federal authorities preemptively muscled aside local law enforcement; rather, federal law enforcement was invited by the locals to become involved. Cisneros first was tried and convicted of capital murder in state court. Only after a Texas appellate court reversed that conviction for insufficiency of the evidence did the state take the initiative and turn over her case to federal prosecutors.[57] As for Marek, a county sheriff's deputy tipped to her quest for a mercenary killer referred the case to the Texas Rangers, who in turn referred the case to the FBI. The two cases before us illustrate the very "[c]ooperation and coordination between Federal and State officials" that Congress intended that § 1958 foster.[58] The embodiment of such clear legislative intent in providing for concurrent jurisdiction and not preemption must not be overlooked in analogizing the extent of congressional intrusion into spheres of state and local law enforcement. With all due respect, we believe that the dissent would be well advised to pull back its states' rights argument. Failure to acknowledge that § 1958 creates *concurrent* jurisdiction only subjects the dissent's objectivity to question. For despite its *power* to preempt this area when regulating commerce, Congress exercised restraint and comity, in the true spirit of Federalism, by creating only *concurrent* jurisdiction.

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[57] *Cisneros*, 203 F.3d at 339. In fact, Cisneros charged before her trial in district court that the federal prosecution was "merely a sham or tool for the State of Texas."

[58] S.Rep. No. 98-225, at 305 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484.

IV.

CONCLUSION

For the foregoing reasons, we hold that both Cisneros's and Marek's murder-for-hire transactions violated 18 U.S.C. § 1958. Cisneros did so by causing her agent to make qualifying telephone calls between the United States and Mexico, thereby using a facility in foreign commerce to facilitate a murder-for-hire. Marek did so by using an interstate commerce facility, Western Union, to wire blood money between Houston and Harlingen, Texas. Satisfied that intrastate use of an interstate commerce facility has satisfied federal jurisdiction under § 1958, there was no error, plain or otherwise, in Marek's conviction or her plea of guilty. We therefore affirm both appellants' convictions and sentences.

AFFIRMED.

E. GRADY JOLLY, Circuit Judge, joined by EDITH H. JONES, JERRY E. SMITH, BARKSDALE and DeMOSS, Circuit Judges, dissenting:

Because I find that § 1958 requires that the use of the facility be in interstate or foreign commerce, I respectfully dissent.

I

In 1993,[1] the time of these offenses, the relevant part of § 1958 read:

> (a) *Whoever* travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or *uses or causes another* (including the intended victim) *to use* the mail or *any facility in interstate or foreign commerce, with intent that a murder be committed* in violation of the laws of any State or the United States *as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value,* shall be fined not more than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.
>
> (b) *As used in this section and section 1959* . . .
>
> (2) *"facility of interstate commerce"* includes means of transportation and communication.

Thus, the issue before us is simply stated: what does the phrase "uses or causes another to use the mail or any facility in interstate or foreign commerce" mean? Does it mean that the particular use must be in interstate or foreign commerce at the time of the offense, or does it mean that the facility must be one generally engaged in

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[1] In 1994, the statute was amended to allow for capital punishment when death resulted from a murder-for-hire. Pub.L.No. 103-322, § 60003(a)(11), 108 Stat.1969, 2033 (1994).

interstate or foreign commerce? The former is the proper way to read the statute.

A

In our original panel opinion in *Cisneros*, we began by noting a difference between § 1958(a) and § 1958(b). Part (a) refers to facilities "*in* interstate or foreign commerce," while (b) mentions facilities "*of* interstate commerce." At that time, we were not sure how to treat part (b). It appeared to be purely definitional, but it purported to define a term, "facility *of* interstate commerce," that was not present in (a). In truth, "of interstate commerce" means something very different from "in interstate commerce." Thus, we concluded that (b) was in conflict with (a), and proceeded with our analysis to resolve that conflict.[2]

We all now appear to agree, however, that (b) is not definitional in the sense that the *Cisneros* panel construed it. Instead, (b) merely provides examples of what might constitute a "facility" for purposes of the statute – means of transportation and communication. Read in this way,

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[2] We ended up ignoring (b) altogether. We acknowledged that the canon against superfluousness counselled against doing this. But this canon cut both ways, because replacing "in" in (a) with "of" would have rendered the part of (a) related to travel superfluous. Interstate travel would always require use of a facility of interstate commerce. At least by ignoring (b) rather than part of (a), however, we were giving precedence to the operational, as opposed to the definitional, part of the statute. *See United States v. Weathers*, 169 F.3d 336, 342 (6th Cir.1999).

(b) does not conflict with (a), as it does not define a term not present in (a).

B

We will therefore focus on part (a) and ask what "use a facility in interstate or foreign commerce" means. The threshold question is whether the phrase "in interstate or foreign commerce" describes the word "use" or the word "facility." If the phrase modifies use, then the statute clearly requires that the particular use be "in interstate or foreign commerce." We believe this is the proper construction.

The majority first contends that because "in interstate or foreign commerce" falls next to "facility," that is the term the phrase modifies. But consider how the statute would have read if the drafters did intend the meaning we propose and had followed the majority's "rule of proximity": "whoever causes another to use, in interstate or foreign commerce, the mail or any facility." This arrangement of words is an awkward grammatical construction that Congress was unlikely to accept. This is true, not only because the construction is awkward, but because it would require the use of the United States mail to be in interstate or foreign commerce before federal jurisdiction would attach.[3] Thus, the rule of proximity does not appear helpful here.

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[3] This would be a different conclusion from the one we reached in *United States v. Heacock*, 31 F.3d 249, 254-55 (5th Cir.1994), with respect to the Travel Act, § 1952.

The majority also considers § 1958's title, "Use of interstate commerce facilities in the commission of murder-for-hire." According to the majority, this suggests that the "in interstate or foreign commerce" clause modifies "facilities." But this title is cursory and intended only as a quick, general description. The title is so inconsistent with the statute that it omits any reference to "foreign facilities." Does that mean that use of facilities in foreign commerce really does not qualify under the statute? No, of course not. The title of a statute is of little help when ascertaining the statute's meaning requires untangling subtleties.

Instead, we return to the phrase in question: "Whoever *travels in* interstate or foreign commerce, or *uses* the mail or any facility *in* interstate or foreign commerce." Because the phrase "in interstate or foreign commerce" is used more than once, it is appropriate to look at the other uses of the term and to interpret them in a consistent manner. In the first part of the statute ("[w]hoever travels in . . . interstate or foreign commerce"), the phrase "in interstate or foreign commerce" is used as an adverbial clause that modifies the verb "travels." The "in" clause tells us where the travel occurred. The second use of the phrase reads: "or uses or causes another to use . . . any facility in interstate or foreign commerce." If the "in" clause is used in a consistent manner in the statute, this second use is an adverbial clause as well, telling us where that use must occur, that is, "in interstate or foreign commerce."

Thus, relating "in interstate or foreign commerce" to "use" appears to be the proper way to read the statute. But even if one does not agree with this reasoning, one

must concede that, at a minimum, the statute is ambiguous as to which words "in interstate or foreign commerce" modifies.

If we then turn to the alternative, that the "in interstate or foreign commerce" clause modifies "facility," it creates greater ambiguity. There are two possible interpretations of that grammatical construction: either any facility that is *generally engaged* "in" interstate or foreign commerce will qualify, or the facility must be "in" interstate or foreign commerce at the moment of the offense. If, however, we chose the first, we would be interpreting "in interstate or foreign commerce" as though Congress had said "of interstate or foreign commerce." Any facility that is *generally engaged "in* interstate or foreign commerce" is, by definition, a facility "*of* interstate or foreign commerce." But the phrase "facility of interstate or foreign commerce" evokes something different from "facility in interstate or foreign commerce."[4] This very significant distinction weighs against the first interpretation and suggests instead that the facility should be in interstate or foreign commerce at the time of the offense. At the very minimum, there is ambiguity in the statute.

If one concedes the statute's ambiguity, the next place to turn is the canons of construction. One is particularly

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[4] If the dictionary definitions of the two words is not enough, consider the Supreme Court's discussion of Congress' interstate commerce powers under *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The Court clearly differentiated between "*in* interstate commerce" and "*of* interstate commerce": "the instrumentalities of interstate commerce, or persons or things in interstate commerce."

apt: when facing a statute that could potentially alter the delicate balance between the state and federal government, especially in the area of criminal law, we require an unmistakably clear statement by Congress that this was its intent. *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 2401, 115 L.Ed.2d 410 (1991); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985); *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971); *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971). The construction the majority proposes would alter this balance significantly. The majority's interpretation would make virtually every murder-for-hire a federal crime, because any use of a telephone or an automobile would qualify.[5] It is difficult to imagine a

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[5] This expansion of federal power stems from the majority's broad interpretation of "in interstate or foreign commerce" to be synonymous with the phrase "of interstate or foreign commerce." Because § 1958(b)(2) specifies that "means of transportation and communication" are facilities *of* interstate commerce for purposes of the statute, any use of a telephone or automobile would be sufficient to invoke the statute. Moreover, courts typically treat the similar term "instrumentality of interstate commerce" as encompassing "means of transportation and communication" like cars and telephones. *See United States v. Gilbert*, 181 F.3d 152, 1999 WL 397424 at *6 (1st Cir.1999) (holding that a telephone is an instrumentality of interstate commerce, regardless of whether it is used in an interstate manner); *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir.1999) (intrastate telephone calls qualify as use of instrumentality of interstate commerce); *United States v. Cobb*, 144 F.3d 319, 322 (4th Cir.1998) (automobiles qualify as instrumentalities of interstate commerce); *United States v. Randolph*, 93 F.3d 656, 660 (9th Cir.1996) ("[C]ars are themselves instrumentalities of interstate commerce."); *United States v.*

murder-for-hire scheme that would not involve the use of a phone or a car at some point. But nothing in the language of the statute suggests that Congress intended to make all such crimes a matter of federal concern. Thus, this canon weighs heavily against the majority's interpretation.

Moving on from parsing the language and construction of the statute, the majority also refers to *United States v. Heacock*, 31 F.3d 249, 254-55 (5th Cir.1994) for support of its position. In that case, we construed § 1958's companion statute, the Travel Act, to encompass purely intrastate use of the mails. And, as the majority notes, we have previously used jurisprudence interpreting the Travel Act as a guide in construing § 1958.

Heacock is not, however, helpful in the inquiry before us. First, the language in the Travel Act at the time was different from that before us in § 1958: "whoever . . . uses any facility in interstate or foreign commerce, including the mail." Any conclusions about the meaning of those words are of questionable value in construing the meaning of a different set and arrangement of words. Second, we based our *Heacock* decision on the reasoning applied in *United States v. Riccardelli*, 794 F.2d 829, 831-33 (2d

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Bishop, 66 F.3d 569, 588 (3d Cir.1995) (motor vehicles are instrumentalities of interstate commerce); *Dupuy v. Dupuy*, 511 F.2d 641, 644 (5th Cir.1975) (holding that intrastate use of phones qualifies as use of an instrumentality of interstate commerce). Of course, these cases all refer to "instrumentalities," not "facilities." As we explained in our original *Cisneros* opinion, however, the important distinction is between the use of "of" and "in," not between "instrumentality" and "facility." *Cisneros*, 194 F.3d at 632, n. 4.

Cir.1986). In that case, the court concluded that the mails were a special case, separate and distinct from "facilities in interstate or foreign commerce." The historical and constitutional pedigree of the postal service indicates that this entity is inherently federal in nature, and that Congress has special concern in regulating its use. Thus, *any* use of the mail qualified under the statute. But *Heacock* does not, therefore, extend to any intrastate use of other facilities for purposes of § 1958.

Neither is the legislative history supportive of the majority's reading of the statute. Although the majority points to passages from a report by the Senate Judiciary Committee for the proposition that Congress intended to extend federal authority under § 1958 to almost all murders-for-hire, limited only by the prosecutor's discretion, it omits passages clearly supportive of a congressional intent to limit jurisdiction to cases in which a facility is in interstate or foreign commerce at the time of the offense. For instance, the report's example of a situation in which the federal nexus is present plainly contemplates the use of a facility in interstate commerce: "Thus, an *interstate* telephone call is sufficient to trigger federal jurisdiction." S.Rep. No. 225, 98th Cong., 1st Sess.1983, 1984 U.S.C.C.A.N. 3182, 3485. The report does not assert that any use of a telephone is sufficient. Instead, it suggests that the actual use must be in interstate or foreign commerce. Similarly, in describing the prosecutorial discretion involved, the report notes that "the committee fully appreciates that many state and local police forces and prosecutors offices are quite capable of handling a murder for hire case notwithstanding *the presence of some interstate aspects* . . . " *Id.* at 3484. This passage suggests

that Congress envisioned that all of the cases falling under the statute would have some "interstate aspects," and not just local use of the facilities *of* interstate commerce. Admittedly, the report does use both the language "facility *of* interstate commerce" and "facility *in* interstate commerce." This alternative use in a legislative report cannot conclusively establish Congress' intent in drafting the statute. Ultimately, as is often the case, the legislative history is inconclusive, and thus unreliable.

All of the ambiguity we have outlined in this dissent leads us to the same conclusion reached in the original *Cisneros* opinion – that the rule of lenity is applicable to this case. The rule applies when, after "seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *United States v. Wells*, 519 U.S. 482, 499, 117 S.Ct. 921, 931, 137 L.Ed.2d 107 (1997) (quoting *Smith v. United States*, 508 U.S. 223, 239, 113 S.Ct. 2050, 2059, 124 L.Ed.2d 138 (1993), and *Ladner v. United States*, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958)). We believe this is the situation here.

The rule of lenity counsels us to resolve ambiguity in criminal statutes by construing such statutes narrowly. This rule is rooted in the due process requirement that Congress clearly articulate what conduct it has made criminal:

> "(W)hen choice has to be made between two readings of what conduct has made [sic] Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that

> is clear and definite. We should not derive criminal outlawry from some ambiguous implication." . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.

Ladner v. United States, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952)). In our case, the rule weighs in favor of requiring that the use of the facility be in interstate or foreign commerce.

The majority has reached a different conclusion. In doing so, they split from the Sixth Circuit. *United States v. Weathers*, 169 F.3d 336, 342 (6th Cir.1999). I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40568

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

BETTY LOUISE MAREK

Defendant-Appellant

Case No. 98-40955

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DORA GARCIA CISNEROS

Defendant-Appellant

Appeals from the United States District Court
for the Southern District of Texas, Brownsville

ON PETITION FOR REHEARING

(Filed Feb. 2, 2001)

Before REYNALDO G. GARZA, POLITZ, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, and DENNIS, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Dora Garcia Cisneros is denied

ENTERED FOR THE COURT:

/s/ Jacques L. Wiener, Jr.
United States Circuit Judge

*Chief Judge King did not participate in this decision.

REHG-2

Supreme Court, U.S.
FILED
JUN 29 2001
OFFICE OF THE CLERK

(2)

Nos. 00-1526 and 00-9419

In the Supreme Court of the United States

DORA GARCIA CISNEROS, PETITIONER

v.

UNITED STATES OF AMERICA

BETTY LOUISE MAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Marek's use of Western Union to send $500 to the "hit man" she hired satisfies 18 U.S.C. 1958(a)'s requirement that the defendant "use[] or cause[] another * * * to use * * * any facility in interstate * * * commerce." Pet. 00-9419.

2. Whether the court of appeals properly applied the plain error standard to petitioner Marek's claim that the district court failed to determine the factual basis for her plea, in violation of Federal Rule of Criminal Procedure 11(f). Pet. 00-9419.

3. Whether the district court properly instructed the jury on the elements of murder for hire in violation of 18 U.S.C. 1958. Pet. 00-1526.

4. Whether petitioner Cisneros's conviction under 18 U.S.C. 1958 was barred by the statute of limitations. Pet. 00-1526.

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In the Supreme Court of the United States

No. 00-1526

DORA GARCIA CISNEROS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 00-9419

BETTY LOUISE MAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 66-103)[1] is reported at 238 F.3d 310. Earlier opinions of the panel in *Cisneros*, No. 00-1526 (Pet. App. 1-30, 31-63) are reported at 194 F.3d 626 and 203 F.3d 333. The opinion of

[1] "Pet. App." refers to the appendix to the petition in No. 00-1526 (*Cisneros*). Unless otherwise indicated, all references to the appendix will be to that appendix.

the panel in *Marek*, No. 00-9419 (00-9419 Pet. App. 47-52) is reported at 198 F.3d 532.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on January 4, 2001. A petition for rehearing in No. 00-1526 (*Cisneros*) was denied on February 2, 2001. Pet. App. 104-105. The petition for a writ of certiorari in No. 00-1526 (*Cisneros*) was filed on April 4, 2001, and in No. 00-9419 (*Marek*) on March 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner Cisneros was convicted on a federal murder-for-hire charge, in violation of 18 U.S.C. 1958. She was sentenced to life imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 31-63.

Following the entry of a guilty plea in the United States District Court for the Southern District of Texas, petitioner Marek was convicted of murder for hire, in violation of 18 U.S.C. 1958. She was sentenced to 87 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. 00-9419 Pet. App. 47-52.

On February 24, 2000, the court of appeals, on its own motion, determined to rehear petitioner Cisneros's case en banc, and ordered that it be consolidated with petitioner Marek's case for purposes of briefing and argument. Pet. App. 64-65. On January 4, 2001, the en banc court affirmed the convictions of both Cisneros and Marek. *Id.* at 66-103.

1. *Petitioner Cisneros.*

a. In the spring of 1992, petitioner Cisneros's daughter began dating high school classmate Joey Fischer in Brownsville, Texas. When Fischer ended the courtship several

weeks later, Cisneros unsuccessfully tried to get Fischer to change his mind. Cisneros then went to fortune teller Maria Martinez, who advised that the relationship would not lead to marriage. Cisneros asked Martinez to put a curse on Fischer, and later asked her to find someone to beat Fischer up. Accordingly, in October 1992, Martinez asked a client, Daniel Garza, to find someone to rough up Fischer. Garza had come to Martinez seeking advice on his failed relationship with his wife. Pet. App. 32.

In early 1993, Cisneros told Martinez that she wanted Fischer murdered. Martinez relayed that request to Garza, who assured her that he would find someone for the job. During the ensuing weeks, Garza frequently called Martinez to discuss his love life. Martinez, however, was under daily pressure from Cisneros for news on the murder scheme; accordingly, she would interrupt Garza during their conversations to ascertain whether he had found someone to kill Fischer. Garza lied several times by stating that he had found someone to commit the crime; he and Martinez would then discuss the murder before returning to the subject of Garza'a relationship with his wife. Garza placed at least four of those telephone calls to Martinez from telephone booths in Mexico. Pet. App. 32-33.[2]

In early February 1993, Garza found two men, Israel Olivarez and Heriberto "Eddie" Pizana, to kill Fischer.

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[2] At trial, Garza testified that he made at least four calls from telephone booths in the Mexican towns of San Fernando and Matamoros, paying for the calls after making them. On cross-examination, when confronted with an interview report of FBI Agent David Church stating that Garza had made the calls collect, Garza testified that the agent was mistaken, and explained that collect calls from Mexico were difficult to make. To support Cisneros's claim that no calls were made from Mexico, the defense called Agent Church, who testified that Garza had told him that the calls from Mexico were collect, but that Martinez's phone records did not reflect any such calls. Pet. App. 33.

Olivarez and Pizana were both hit men and car thieves working for a drug smuggling and car theft ring operated by Rudy Cuellar. Olivarez told Garza that they would commit the crime the next time they were in Brownsville. Garza gave the two men a photo of Fischer and a map to his house. Pet. App. 34. On the afternoon of March 2, 1993, Garza stopped at the La Quinta Inn in Brownsville, where he met Olivarez. Olivarez told him that "he was ready to do the job." That evening, at 6:39 p.m., a car with Mexican license plate number "821 THE7" crossed into the United States from Mexico at the Brownsville point of entry. A vehicle with that plate had crossed the border 18 times between August 1992 and March 1993. At 8:26 p.m., Pizana and another Cuellar hit man, Ramon Palomares, checked into the La Quinta Inn. The receptionist registered their car as a white Grand Marquis with Mexican plates; her handwriting made it difficult to decipher whether the plate number was "821 TWEX" or "821 THE7." *Ibid.*

Around 7:00 a.m. on March 3, 1993, Fischer was shot and killed in his driveway. Handwriting on the back of a bail bondsman's business card found at the scene matched Cuellar's handwriting. A four-door white car with Mexican plates, driven by a young Hispanic man with a short beard, was seen in the vicinity of Fischer's house near the time of the murder. Within an hour of the murder, Olivarez told Garza that Fischer was dead; Garza told Martinez; and Martinez paid Garza for the murder. Garza gave the money to Olivarez. Pet. App. 35-36.

Garza agreed to cooperate with the authorities. Wearing a wire, he twice called Martinez and told her that the gunmen wanted more money; each time, Martinez gave it to him. Police arrested Martinez, who agreed to arrange a meeting with Cisneros. The police arrested Cisneros in her car as she was giving Martinez $500. Pet. App. 36.

b. Cisneros was charged with and convicted of violating the federal murder-for-hire statute, 18 U.S.C. 1958. Section 1958 provides in relevant part:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed * * * as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; * * *
>
> (b) As used in this section and section 1959—
>
> * * * * *
>
> (2) "facility of interstate commerce" includes means of transportation and communication.

18 U.S.C. 1958 (1994 & Supp. V 1999) (footnotes omitted).

At trial, the district court instructed the jury:

> It is a crime for anyone to cause another to travel in foreign commerce or cause another to use a facility in foreign commerce, with the intent that a murder be committed * * * as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value. Pecuniary value is money.
>
> For you to find [Cisneros] guilty, you must be satisfied * * * that all of the following matters have been proven to your satisfaction by proof beyond a reasonable doubt. * * *
>
> Number one, that she caused another to travel in foreign commerce or caused another to use a facility in foreign commerce.

> Now, "facility in foreign commerce" includes means of transportation and communication. Now, as part of the burden of proof, the Government does not have to prove that [Cisneros] intended that foreign travel occur, or that foreign commerce facilities be used in connection with the murder, or even that [Cisneros] knew that foreign travel occurred or would occur, or that foreign commerce facilities were or would be used. But the Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce.
>
> In addition to that, that she did that with the intent that the murder of Albert Joseph "Joey" Fischer be committed in violation of the laws of the State of Texas.

Tr. 1515-1517. The jury found Cisneros guilty.

c. The court of appeals affirmed. Pet. App. 31-63.[3] The court first addressed the jurisdictional element of 18 U.S.C. 1958, which in relevant part requires that the defendant "use" or cause another to "use" a "facility in interstate or foreign commerce." To satisfy that jurisdictional element, the court held, it is not sufficient that the defendant use or cause another to use an *interstate facility*. Instead, the court held, the *use* of the facility must be interstate in nature, *i.e.*, it must cross state lines. Pet. App. 38-45. In the case before it, the court concluded that there was an interstate or foreign use of a facility of commerce. In particular, the court concluded that the jury could have found that Martinez had participated in international telephone calls as Cisneros's

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[3] The court had affirmed Cisneros's conviction in an earlier opinion (Pet. App. 1-30), dated October 28, 1999, but vacated that opinion when it granted Cisneros's petition for panel rehearing.

agent, and that those calls facilitated the murder-for-hire scheme. *Id.* at 47-50.

The court also found that there was "a sufficient nexus between the use of the facility in foreign commerce and the murder scheme because the telephone calls unquestionably facilitated in arranging the murder." Pet. App. 49. The court reasoned that, "[w]ithout Martinez's incessant reminders during those calls, it is reasonable for a jury to have believed that Garza would not have made as serious an effort to find a hit man." *Ibid.* The court rejected Cisneros's claim that the district court erred in refusing to instruct the jury that the use of the facility in foreign commerce had to have been initiated "in furtherance" of the murder for hire. *Id.* at 53. "Garza's calls need not have been made for the purpose of furthering the murder-for-hire," the court stated. *Ibid.* "It is enough that those calls facilitated the scheme." *Ibid.* The court further explained:

> Here, it may well be true that Garza did not place the calls "in furtherance" of the murder for hire scheme. He called Martinez for marital advice. Martinez was the one who would bring up the subject of the Fischer murder. But those international calls gave Martinez the opportunity to pursue her earlier requests that Garza arrange the murder. In that sense, they facilitated the murder, even though the use of the telephone across national boundaries was purely incidental.

Id. at 53-54. The court also rejected Cisneros's claim that the district court should have required proof that she knew, intended, or could have foreseen that she would cause another to travel in foreign commerce or use facilities in foreign commerce. *Id.* at 46, 56.

Finally, the court rejected Cisneros's claim that the district court should have instructed the jury on the statute of limitations. The statute of limitations begins to run, the

court stated, once the crime is complete. Pet. App. 57. In this case, one of the elements of the murder-for-hire offense is receipt of pecuniary value or a promise or agreement to pay, and the indictment charged Cisneros with "caus[ing] another to . . . use a facility in foreign commerce . . . with the intent that the murder of [Fischer] be committed . . . as consideration for a promise and agreement to pay, *and the receipt of, $3,000.*" *Ibid.* The crime as charged and tried by the government in this case, the court reasoned, was complete upon the receipt of the $3000 payment on March 3, 1993. Consequently, the court held, the indictment on February 23, 1998, fell within the five-year limitation period. *Ibid.*

2. *Petitioner Marek.*

Petitioner Marek arranged to have her boyfriend's paramour murdered in exchange for a $500 payment. Unbeknownst to Marek, however, the purported hit man was an undercover FBI agent. On November 19, 1997, Marek delivered $500 to Western Union in Houston, Texas, and the wire transfer was received by the undercover agent in Harlingen, Texas. Marek was indicted on a charge of murder for hire, in violation of 18 U.S.C. 1958. She pleaded guilty to the charge, and was sentenced to 87 months' imprisonment.

Marek appealed her guilty plea, and the court of appeals affirmed. The court found that the intrastate electronic transfer of funds by petitioner via Western Union, an interstate commerce facility, satisfied the jurisdictional requirement of the federal murder-for-hire statute. 00-9419 Pet. App. 48-52. Judge Jolly, who had authored the *Cisneros* opinion, dissented, based on his view that the murder-for-hire statute "should be limited to uses of facilities being used 'in' interstate or foreign commerce as part of the commission of the crime." *Id.* at 52.

3. *En banc proceedings.*

The court of appeals sua sponte reheard both cases en banc. To resolve Marek's case, the court stated, it was necessary to decide "whether, for purposes of satisfying the jurisdictional element of the federal murder-for-hire statute," 18 U.S.C. 1958(a), "it is sufficient that the defendant used an interstate commerce facility in an *intra* state fashion" or whether, instead, the "defendant's use of that facility" must itself be interstate. Pet. App. 74. Resolution of that question, the court further concluded, depended on a basic question of grammar: whether "the phrase 'in interstate or foreign commerce'" in the statute "modifies 'use,'" such that the *use* must be interstate or foreign in nature, or whether the phrase instead "modifies 'facility,'" such that the *facility* must be in interstate or foreign commerce. *Id.* at 76. The court of appeals determined that the latter construction was correct, and that Section 1958 does not require the individual defendant's use of the facility to be interstate in nature. "Purely from a structural viewpoint, we must conclude that 'in interstate or foreign commerce' is an adjective phrase that modifies 'facility,' the noun that immediately precedes it—*not* an adverbial phrase that modifies the syntactically more remote verb, '[to] use.'" *Ibid.* The court found further support for that construction in other provisions of the statute, *id.* at 85-86, in its legislative history, *id.* at 86-87, and in Section 1958's title, which is "Use of interstate commerce facilities in the commission of murder-for-hire," *id.* at 87. Accordingly, the court held that "§ 1958's *use* of a 'facility in interstate commerce' is synonymous with the use of an 'interstate commerce facility' and satisfies the jurisdictional element of that federal murder-for-hire statute, irrespective of whether the particular transaction in question is itself *inter* state or wholly *intra* state." *Id.* at 68.

The court therefore rejected petitioner Marek's claim, made for the first time on appeal, that the district court had violated Rule 11 of the Federal Rules of Criminal Procedure by failing to determine whether Marek's use of Western Union was interstate in nature. Because Marek admitted using Western Union, and Western Union is an interstate commerce facility, the court concluded that Section 1958's jurisdictional element had been met. The court of appeals thus found that the district court did not commit error, much less plain error, in accepting Marek's guilty plea. Pet. App. 71-74, 93. As to petitioner Cisneros, the court held that, even if Section 1958 were given the narrowest interpretation possible, affirmance of her conviction was proper based on the international telephone calls used to facilitate the murder-for-hire scheme. *Id.* at 71, 93.

Judges Jolly, Jones, Smith, Barksdale, and DeMoss dissented. Pet. App. 93-103. In their view, Section "1958 requires that the use of the facility be in interstate or foreign commerce." *Id.* at 93.

ARGUMENT

A. Petitioner Marek contends (00-9419 Pet. 9-25) that her use of Western Union to make an intrastate payment did not constitute the use of "any facility in interstate * * * commerce" within the meaning of the murder-for-hire statute, 18 U.S.C. 1958(a). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Marek asks this Court to grant the petition to address the meaning of the clause "uses * * * any facility in interstate or foreign commerce" in 18 U.S.C. 1958(a). In particular, she argues (00-9419 Pet. 13-14) that the phrase "in interstate * * * commerce" in Section 1958(a) modifies the word "uses"; consequently, she maintains, the jurisdic-

tional requirement of 18 U.S.C. 1958(a) is not met unless the government shows that the *use* of the facility was interstate commerce, *i.e.*, that the use itself was interstate. Petitioner Marek thus disagrees with the en banc court's conclusion that the phrase "in interstate * * * commerce" modifies the word it immediately follows, "facility," and that the government as a result need only prove that the facility itself (but not necessarily the defendant's use of it) was in interstate commerce.

a. As an initial matter, at the time she pleaded guilty to the offense, Marek did not contend that the statute required that her *use* of Western Union be interstate in nature; instead, she raised that issue for the first time on appeal by challenging the adequacy of the factual basis for the plea. See Pet. App. 72. But Marek nowhere argues that, if the district court had inquired into whether her use of Western Union was interstate in nature before accepting her plea, the result in this case would have been different. The indictment identified Western Union as the facility of interstate commerce; Marek admitted using Western Union to transfer money to further the murder for hire; and it never has been disputed that the use of Western Union was in fact interstate in nature. As the court of appeals observed, "the Western Union procedure for wiring money from one Texas city to another * * * required Western Union agents in both cities to call the company's main computer in Bridgeton, Missouri." *Id.* at 69 n.8. As a result, even under the construction of the statute Marek now posits, the further inquiry under Rule 11(f) Marek claims was required would merely have shown that her guilty plea was supported by an adequate factual basis.[4]

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[4] Marek raises no issue of voluntariness. Nor does she anywhere suggest that further inquiry under Rule 11(f) would have caused her to refuse the plea.

b. In any event, Marek's construction of the statute is erroneous. Marek principally relies (00-9419 Pet. 12-14) on a distinction between statutes that use the phrase "facility in interstate * * * commerce" on the one hand, and those that use the phrase "facility of interstate commerce" on the other. In particular, Marek contends that, if the statute requires the use of a "facility *in* interstate" commerce, the government must show that the charged *use* itself was interstate in nature and constituted interstate commerce. In contrast, where the statute requires use of a "facility *of* interstate" commerce, Marek argues, the government need only show that the facility ordinarily may be used for interstate commerce, and need not demonstrate that the actual use charged was interstate in nature. See, *e.g.*, Pet. App. 99 n.5 (dissenting opinion).

In some contexts, that distinction may be relevant. Compare *United States* v. *Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989) (concluding, in the context of the Travel Act, 18 U.S.C. 1952, that "a statute that speaks in terms of an instrumentality *in* interstate commerce rather than an instrumentality *of* interstate commerce is intended to apply to interstate activities only"), with *United States* v. *Baker*, 82 F.3d 273 (8th Cir.) (requirements of the Travel Act satisfied where defendant caused extortion victim to withdraw money from an ATM that was part of an interstate network), cert. denied, 519 U.S. 1020 (1996). But it has no application in the context of the murder-for-hire statute, 18 U.S.C. 1958, because the murder-for-hire statute uses the phrases "facility in interstate * * * commerce" and "facility of interstate commerce" interchangeably. See 18 U.S.C. 1958(a) (1994 & Supp. V 1999); 18 U.S.C. 1958(b)(2). The substantive prohibition provided by Section 1958 uses the phrase "facility in interstate * * * commerce." 18 U.S.C. 1958(a) (1994 & Supp. V 1999). But Section 1958(b), which provides relevant definitions, uses the phrase "facility of

interstate commerce," and defines that phrase as including any "means of transportation and communication." The definition in Section 1958(b) must be intended to apply to Section 1958(a). Neither the phrase "facility of interstate commerce" nor the phrase "facility in interstate commerce" appears in any other provision to which the definition provided by Section 1958(b) applies.[5] Accordingly, it is plain that Congress perceived no difference between the terms "facility in interstate commerce" and "facility of interstate commerce." The legislative history confirms that conclusion. As the court of appeals observed:

> In a discussion of the murder-for-hire portion of the bill extending over three pages, the Senate report uses the phrase "facility [or facilities] *of* interstate commerce" four times and "facility *in* interstate commerce" only once, drawing no apparent distinction between the two. We find inescapable the conclusion that "of" and "in" were considered and used by Congress as synonyms in regards to this particular statute.

Pet. App. 87.[6] Because Western Union's network clearly is an interstate "means of * * * communication," *Western*

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[5] The definitions in Section 1958(b) also apply to 18 U.S.C. 1959 (violent crimes in aid of racketeering activity). But Section 1959 does not refer to facilities either in or of interstate commerce. Thus, Section 1958(b)(2), defining "facility of interstate commerce," must be intended to shed light on Section 1958(a).

[6] See S. Rep. No. 225, 98th Cong., 1st Sess. 304 (1983) (murder-for-hire statute "punishes * * * the use of the facilities of interstate or foreign commerce or of the mails"); *id.* at 305 (option of federal prosecution "should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper [f]ederal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present"); *id.* at 306 ("[t]he gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent").

Union Tel. Co. v. *Lenroot*, 323 U.S. 490, 502 (1945), evidence that such a facility was used in a murder-for-hire scheme establishes the jurisdictional element of Section 1958.

Marek's construction of Section 1958, moreover, is at odds with basic principles of grammar and statutory construction. As the court of appeals observed, the words "in interstate or foreign commerce" immediately follow the word "facility"; it is thus most natural to read them as modifying the word "facility" rather than the more distant verb "[to] use." Pet. App. 76. Where Congress has sought to require that the "use" itself be interstate in nature, it has found clear means of expressing that concept. See *id.* at 77 n.22 (citing former 18 U.S.C. 247(b)). That Section 1958(a) is designed to reach any use of interstate facilities in furtherance of a murder for hire (and not merely interstate uses of such facilities) is confirmed by its title, "Use of interstate commerce facilities in the commission of murder-for-hire." "The title is unambiguous and clearly employs 'interstate commerce' to modify 'facility,' not 'use.'" *Id.* at 87. Marek offers no reason why Section 1958 should be interpreted to create a conflict in meaning between its text and its title. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotation marks omitted); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (similar).[7]

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[7] For that reason, Marek's reliance on the rule of lenity (00-9419 Pet. 23-25) is misplaced. The rule of lenity applies only where "grievous ambiguity or uncertainty in the language and structure of the Act" remains *after* the Court has "seize[d] everything from which aid can be derived." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (internal quotation marks omitted). It does not apply simply because a statutory phrase requires interpretation. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) ("The simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule, for most statutes are

Contrary to Marek's contention (00-9419 Pet. 16-19), that conclusion is consistent with Congress's intent. The national government has a strong interest in ensuring that facilities of interstate commerce are not threatened or employed for improper purposes, even when the particular use or threat is intrastate in nature. As this Court has explained, "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained," *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917), as has Congress's authority "to regulate and protect the instrumentalities of interstate commerce," even where "the threat" or abuse "may come only from intrastate activities," *United States* v. *Lopez*, 514 U.S. 549, 558 (1995).

Here, the legislative history upon which Marek relies demonstrates that Congress broadly intended to protect interstate facilities of commerce from abuse, even if the threat might be from purely intrastate activity. As the Senate Report explains:

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ambiguous to some degree."). Moreover, the rule of lenity "is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979). Application of the rule would not serve that purpose here, since the interstate nexus is the jurisdictional element of the murder-for-hire statute, and the government need not prove that the defendant intended that foreign commerce facilities be used, or even that he knew that such facilities would be used. See pp. 24-26, *infra*. Accordingly, petitioner was not "forced to speculate" as to the illegal nature of her conduct. See *United States* v. *Feola*, 420 U.S. 671, 676-677 n.9 (1975) ("The significance of labeling a statutory requirement as 'jurisdictional' is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute."). As the decision below aptly observed (Pet. App. 90), "[i]t would be absurd to say that Marek did not know that her conduct—hiring an assassin to commit murder—was prohibited."

> With respect to the [murder-for-hire] offense, the Committee is aware of the concerns of local prosecutors with respect to the creation of concurrent Federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of State and local authorities. However, the Committee believes that *the option of Federal investigation and prosecution should be available when* a murder is committed or planned as consideration for something of pecuniary value and *the proper Federal nexus, such as* * * * *use of the facilities of interstate commerce, or use of the mails, is present.*

See S. Rep. No. 225, 98th Cong., 1st Sess. 304 (1983) (emphasis added; footnote omitted). While the Report voiced the expectation that federal prosecutors would exercise discretion and coordinate with state officials to ensure appropriate use of the statute, *id.* at 305, that passage cannot be read (see 00-9419 Pet. 17-19) to limit Section 1958 to murders that involve interstate travel or communications that cross state lines. Instead, the Senate Report evidences Congress's understanding that Section 1958 creates broad federal jurisdiction over murder-for-hire schemes that involve use of the mails or other facilities of interstate commerce.[8]

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[8] In support of her argument that the murder-for-hire statute requires interstate use, Marek also points (00-9419 Pet. 18) to the Senate Report's observation (S. Rep. No. 225, *supra*, at 306) that "an interstate telephone call is sufficient to trigger Federal jurisdiction, as it is under the [Travel Act, 18 U.S.C. 1952]." That observation, however, does not establish that an interstate call is *necessary* to create such jurisdiction under the murder-for-hire statute. Rather, immediately following the observation on which Marek relies, the Senate Report declares that "[t]he gist of the offense is the travel in interstate commerce or *the use of the facilities of interstate commerce or of the mails* with the requisite intent." S. Rep. No. 225, *supra*, at 306 (emphasis added).

c. For the same reasons, interpreting Section 1958 to cover intrastate use of an interstate facility does not (00-9419 Pet. 21-23) run afoul of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) (1994), which made it a federal crime "for any individual knowingly to possess a firearm" in a school zone, exceeded Congress's powers under the Commerce Clause. 514 U.S. at 551. In that case, however, there was no claim that the relevant prohibition was "a regulation of the use of the channels of interstate commerce" or an effort "to protect an instrumentality of interstate commerce." *Id.* at 559. The prohibition of Section 1958, in contrast, is such a regulation; it proscribes the misuse of interstate commerce facilities in connection with murder-for-hire schemes.[9] In *Lopez* itself, this Court emphasized that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce * * * even though the threat may come only from intrastate activities." *Id.* at 558. Because Section 1958 represents an effort to prevent the misuse of channels and instrumentalities of interstate commerce, *Lopez* casts no doubt on Section 1958's validity, even when it is applied to activities that are themselves intrastate in nature. See *United States* v. *Gilbert*, 181 F.3d 152, 157-159 (1st Cir. 1999)

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[9] Moreover, in *Lopez* the Court emphasized that the statute there did not have "anything to do with 'commerce' or any sort of economic enterprise"; instead, it barred possession of a gun near a school, without any nexus to economic activity. 514 U.S. at 561. Section 1958, in contrast, is addressed exclusively to a particular sort of economic enterprise: it bars murders for hire, *i.e.*, murders performed in exchange for payment or a promise to pay something of *pecuniary value*. Congress has the power to regulate illegal, as well as legal, commerce.

(rejecting *Lopez* challenge to bomb threat conviction based on intrastate phone calls).[10]

Marek's Tenth Amendment argument (00-9419 Pet. 21-23) is unsupported for the same reason. In *New York* v. *United States*, 505 U.S. 144, 156 (1992), this Court explained that, in cases "involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." Because the murder-for-hire statute is within Congress's power under the Commerce Clause—it regulates the use of interstate commerce facilities—it invades no prerogative reserved to the States.

d. Finally, Marek argues (00-9419 Pet. 9-10) that the decision below conflicts with the Sixth Circuit's decision in *United States* v. *Weathers*, 169 F.3d 336, cert. denied, 528 U.S. 838 (1999). As Marek notes, the *Weathers* opinion stated that the federal murder-for-hire statute "is intended to apply to interstate activities only." *Id.* at 341 (quoting *United States* v. *Barry*, 888 F.2d at 1095). The discussion in *Weathers* upon which petitioner relies, however, was not necessary to the judgment. In that case, the court *affirmed* the defendant's conviction, finding that, when the defendant

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[10] Many existing federal statutes permit federal jurisdiction based on intrastate activities that use interstate commerce facilities. Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. 78j, for example, may be invoked based on purely local telephone calls. See *Loveridge* v. *Dreagoux*, 678 F.2d 870, 873-874 (10th Cir. 1982); *Spilker* v. *Shayne Labs., Inc.*, 520 F.2d 523, 524-525 (9th Cir. 1975); *Dupuy* v. *Dupuy*, 511 F.2d 641, 642-644 & n.3 (5th Cir. 1975); *Aquionics Acceptance Corp.* v. *Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974); *Myzel* v. *Fields*, 386 F.2d 718, 728 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

used a cellular phone to call another person *within* the same State, an electronic signal was sent to communications equipment in *another* State; that interstate signal, the court concluded, was sufficient to establish Section 1958's jurisdictional element. *Id.* at 342 (telephone company was "required to engage in interstate activities by sending a search signal to communications equipment in another state to locate [the defendant's] cellular telephone"). Marek cites no decision of any court of appeals reversing a murder for hire conviction where, as here, the defendant used an interstate communications network to facilitate the murder for hire.

In any event, the question does not appear likely to recur. Although the federal murder-for-hire statute is decades old, the issue Marek raises—whether the statute requires interstate use or merely use of an interstate facility—has been addressed in only two published court of appeals decisions, *Weathers* and the decision below. Furthermore, in both of those cases, the issue was largely academic, because the *uses* of the interstate networks at issue *were* both interstate in nature. As noted above, in *Weathers*, the court of appeals addressed the issue in *dictum*; the use at issue there was interstate, since interstate signaling was involved. Similarly, in this case the issue arose only because Marek failed to press her demand for an inquiry into additional facts when the district court conducted its Rule 11(f) inquiry. In point of fact, no one has ever disputed that, because the Western Union transfer Marek initiated required phone calls between two Texas cities and Western Union's computer in Bridgeton, Missouri, an actual interstate use of the Western Union facility occurred. See p. 11, *supra*. In any event, because the issue thus far has been addressed by only two

circuits (one of them in *dictum*), review by this Court at the present time would be premature.[11]

2. Petitioner Marek also urges (00-9419 Pet. 26-29) this Court to grant her petition because the courts of appeals are divided on the standard of review applicable on appeal when a district court fails to determine that there is a factual basis for a defendant's guilty plea, as required by Federal Rule of Criminal Procedure 11(f), but the defendant makes no objection to that deviation from Rule 11 in the trial court. The proper standard of review of a related Rule 11 issue is currently pending before the Court. *United States* v. *Vonn*, cert. granted, 121 S. Ct. 1185 (2001) (No. 00-973). As explained above, however, Marek's conviction was properly affirmed because the factual basis was adequate. While Marek's claim might fail on plain-error review even if her statutory argument were correct, application of a harmless error standard would not assist her. Accordingly, there is no need to hold this case pending the Court's decision in *Vonn*.

B. Petitioner Cisneros does not dispute that one of the participants in her murder-for-hire scheme used a facility of foreign commerce. Nor does she deny that the use itself was in foreign commerce. Instead, she raises a variety of largely case-specific challenges (00-1526 Pet. 13-25) to the jury instructions on, and the government's proof of, the jurisdic-

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[11] Marek also relies (00-9419 Pet. 9-11) on a pair of district court decisions, *United States* v. *Stevens*, 842 F. Supp. 96, 98 (S.D.N.Y. 1994), and *United States* v. *Paredes*, 950 F. Supp. 584, 590 (S.D.N.Y. 1996). In *Stevens*, however, there was an interstate use: the court found that pager messages used in the murder-for-hire scheme were routed across state lines. 842 F. Supp. at 97-98. There were interstate pager-search signals in *Paredes* as well. 950 F. Supp. at 586-587 & n.4. The district court in *Paredes*, however, concluded that such interstate signaling is insufficient to satisfy the jurisdictional element. *Id.* at 589-590. No court of appeals has accepted that conclusion (and the *Weathers* decision on which Marek relies rejects it).

tional element. The court of appeals correctly rejected those claims, and no further review is warranted.[12]

1. Cisneros first contends (00-1526 Pet. 17) that the district court's jury instructions permitted the jury to find her guilty without making any finding that she used interstate or foreign commerce facilities or caused another to do so. That fact-bound claim of instructional error is without merit. The district court specifically told the jury that, "to find [Cisneros] guilty, you must be satisfied * * * by proof beyond a reasonable doubt" that "[Cisneros] *caused* another to travel in foreign commerce or *caused* another to use a facility in foreign commerce." Tr. 1516 (emphasis added). Cisneros bases her contrary contention on the district court's later statement that "[t]he Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce"; that statement, she argues, omits the requirement that *she* cause another to use an interstate facility. 00-1526 Pet. 10 n.6, 17. Because Cisneros did not object to the instruction on that ground at the time it was given, her claim is reviewable only for plain error. Once the instruction is read in context, it is apparent that the instruction was not error at all, much less plain error. After

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[12] Cisneros also argues (00-1526 Pet. 13-17) that the court of appeals' en banc opinion erroneously failed to reinstate portions of the panel opinion, all of which had rejected Cisneros's claims on appeal. The asserted error is entirely case-specific and does not meaningfully aggrieve Cisneros in any event. Insofar as there are differences in the facts recited by the vacated panel opinions and the en banc opinion (00-1526 Pet. 16), the differences are not material; each opinion concludes that her conviction should be affirmed. To the extent that Cisneros is concerned that she lacks a final court of appeals judgment from which to seek this Court's review, that concern is misplaced. Even if the en banc opinion does not address all of Cisneros's myriad claims in as much detail as the earlier (now vacated) panel opinions, the en banc court entered a final judgment of affirmance that is reviewable by this Court.

explaining that the government does not have to prove that Cisneros *knew* or *intended* that a foreign commerce facility be used in the murder-for-hire scheme, the court merely emphasized that the jury still had to find that a facility of foreign commerce in fact was used; the government, the court reminded the jury, "must prove that somebody * * * caused another to use a facility in foreign commerce." Tr. 1516. Indeed, immediately after that, the court clarified, "[i]n addition to that, that she did that with the intent that the murder of Albert Joseph 'Joey' Fischer be committed." Tr. 1516-1517.

2. Cisneros's challenge to the district court's decision not to give her proposed causation instruction (00-1526 Pet. 19-20) similarly does not warrant review. Cisneros claims that the district court should have told the jury that she could have "caused" another to use facilities in foreign commerce only if she *knew* or could have *foreseen* that use of foreign commerce facilities would occur. As the court of appeals observed (Pet. App. 56), that instruction "confuses intent with causation." Moreover, as the court correctly found, *ibid.*, the causation element in the murder-for-hire statute does not require that the specific use of the interstate or foreign commerce facility be foreseen or even known. See *United States* v. *Houlihan*, 92 F.3d 1271, 1292 (1st Cir. 1996) ("[T]here is no requirement that each accused * * * intend [a facility in interstate commerce] to be used, or even that each accused know that such a facility probably will be used."); *United States* v. *Winters*, 33 F.3d 720, 721 (6th Cir. 1994) ("[T]here is no intent requirement with respect to the use of the mails [under 18 U.S.C. 1958], and * * * this element of the crime is jurisdictional in nature."), cert. denied, 513 U.S. 1172 (1995); *United States* v. *Edelman*, 873 F.2d 791, 795 (5th Cir. 1989) ("government need not establish that [defendant] intended that the mail be used or that he even knew the mail was used"; government need

only prove specific intent to commit the underlying offense); *United States* v. *Razo-Leora*, 961 F.2d 1140, 1148 (5th Cir. 1992) (same).[13]

That interpretation of the murder-for-hire statute is consistent with this Court's decisions on knowledge of jurisdictional elements. For instance, in *United States* v. *Yermian*, 468 U.S. 63, 68 (1984), the Court held that 18 U.S.C. 1001 does not require the government to prove that a defendant has made false statements "with actual knowledge of federal agency jurisdiction." The Court explained (468 U.S. at 68-70):

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[13] The courts have reached the same conclusion with respect to the similarly worded Travel Act, 18 U.S.C. 1952. *United States* v. *Auerbach*, 913 F.2d 407, 410 (7th Cir. 1990); *United States* v. *Clark*, 646 F.2d 1259, 1268 n.16 (8th Cir. 1981); *United States* v. *Herrera*, 584 F.2d 1137, 1150 (2d Cir. 1978); *United States* v. *Perrin*, 580 F.2d 730, 737 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979); *United States* v. *Villano*, 529 F.2d 1046, 1054 (10th Cir.), cert. denied, 426 U.S. 953 (1976); *United States* v. *LeFaivre*, 507 F.2d 1288, 1297-1299 & n.14 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Roselli*, 432 F.2d 879, 891 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). Since knowledge of one's own interstate travel is not an element of a violation of the Act by a principal, those courts have held that a defendant may be convicted of aiding and abetting a violation of the Act—or conspiracy to violate its terms—without a showing that the defendant knew or intended that another individual would engage in interstate travel. See, *e.g.*, *United States* v. *LeFaivre*, 507 F.2d at 1298 (aiding and abetting); *United States* v. *Herrera*, 584 F.2d at 1150 (conspiracy); *United States* v. *Roselli*, 432 F.2d at 891-892 (conspiracy). See *United States* v. *Feola*, 420 U.S. 671, 696 (1975) ("[W]here knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."). The cases cited by Cisneros (00-1526 Pet. 20) are not to the contrary. Those are cases where the defendant knew of the interstate nexus; but none of those cases reversed a conviction on the ground that knowledge of the nexus is required.

> The statutory language requiring that knowingly false statements be made "in any matter within the jurisdiction of any department or agency of the United States" is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern. Jurisdictional language need not contain the same culpability requirement as other elements of the offense. * * * On its face, * * * § 1001 requires that the Government prove that false statements were made knowingly and willfully, and it unambiguously dispenses with any requirement that the Government also prove that those statements were made with actual knowledge of federal agency jurisdiction.

Similarly, in *United States* v. *Feola*, 420 U.S. 671, 676-677 n.9 (1975), the Court observed that "[t]he significance of labeling a statutory requirement as 'jurisdictional' is * * * that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." Accord *Barnes* v. *United States*, 412 U.S. 837, 847 (1973) (knowledge that checks were stolen from the United States mails, as opposed to knowledge that they were stolen, not required under 18 U.S.C. 1708).

3. Alternatively, Cisneros claims that the government had to prove that interstate facilities were used "in furtherance of" or "facilitated" the underlying offense. See 00-1526 Pet. 22-23. As the court of appeals explained, however, the government met that burden. Cisneros's constant importunings for news of the planned murder, that court explained, caused Martinez to interrupt Garza during their international telephone conversations to press the earlier request that Garza find someone to commit the murder. Pet. App. 49. Martinez's use of international telephone lines to com-

municate about a planned murder did facilitate the scheme. Absent the "incessant reminders during those calls," the court of appeals explained, "Garza [might] not have made as serious an effort to find a hit man." *Ibid.*

Cisneros's proposed instruction, moreover, was fatally defective. Cisneros proposed that the government be required to prove that Cisneros "caused *Daniel Garza* to use a facility of foreign commerce to call Maria Martinez in Brownsville from [Mexico] * * * in furtherance of the alleged murder-for-hire." 00-1526 Pet. 9 n.4 (emphasis added). But the government was not required to prove that Cisneros caused *Garza* to *initiate* a phone call in furtherance of the murder for hire. The government instead was required to prove that Cisneros caused *someone* to *use* a foreign or interstate commerce facility in furtherance of the scheme. In this case, the government showed that Cisneros caused *Martinez* to use a facility of foreign commerce to facilitate the scheme. In particular, even though Garza may have initiated the international calls with Martinez to discuss other matters, Cisneros's constant pressure caused Martinez to communicate over facilities of foreign commerce to promote the murder-for-hire scheme. Pet. App. 49, 53-54.[14]

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[14] Cisneros's claim (00-1526 Pet. 23) of conflict between the (vacated) panel opinion on rehearing (Pet. App. 48-49) and the First Circuit's decision in *United States* v. *Houlihan*, 92 F.3d at 1292, is without merit. According to Cisneros, the decision below rejected any requirement that the use of the facility be in "furtherance" of the murder for hire, and instead required that the use "facilitate" the scheme; the First Circuit and earlier Fifth Circuit Travel Act cases, she asserts, use a "furtherance" standard. 00-1526 Pet. 23 (citing *Houlihan*, *supra*; *United States* v. *Presley*, 478 F.2d 163, 168 (5th Cir. 1973); and *United States* v. *Gooding*, 473 F.2d 425, 427-428 (5th Cir.), cert. denied, 412 U.S. 928 (1973)). Elsewhere, however, Cisneros concedes that the standard of "furtherance" employed in *Houlihan* and earlier Fifth Circuit decisions does not meaningfully differ from the standard of "facilitation" employed by the vacated panel decision. In any event, any tension between the vacated

Relying on *Rewis* v. *United States*, 401 U.S. 808 (1971), Cisneros also asserts (00-1526 Pet. 18, 23-25) that the nexus between the international telephone calls and the murder-for-hire scheme was too "fortuitous and incidental" to support a conviction under Section 1958. In *Rewis*, persons operating an illegal lottery in Florida were charged with violating the Travel Act, 18 U.S.C. 1952, based on the interstate travel of some of their customers. The Court held that "Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State." 401 U.S. at 812. The Court adverted, however, to "cases in which federal courts ha[d] correctly applied [the Travel Act] to those individuals whose *agents* or *employees* cross state lines in furtherance of illegal activity." *Id.* at 813 (emphasis added). One such case was *United States* v. *Zizzo*, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965), where the court upheld the Travel Act conviction of a defendant who employed out-of-state individuals to work at his gambling business because "[i]t is clear that the gambling business operated by [the defendant] caused the interstate travel by the three employees." *Id.* at 580. In this case too, Cisneros's request that Martinez find someone to kill Fischer caused Martinez, as Cisneros's agent, to use a foreign commerce facility (international phone lines) to press Garza to hire the hit men. Because the international conversations served to facilitate the murder-for-hire scheme, the evidence established a legally sufficient nexus between the telephone use and the illegal scheme. Pet. App. 49. See *United States* v. *Weathers*, 169 F.3d at 343-344; *United States* v. *Baker*, 82 F.3d at 275-276; *United States* v. *Auerbach*, 913 F.2d at 410-

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panel opinion and earlier Fifth Circuit decisions is a matter for the Fifth Circuit, not this Court.

411; *United States* v. *Garrett*, 716 F.2d 257, 264-266 (5th Cir. 1983), cert. denied, 466 U.S. 937 (1984).

4. Finally, Cisneros contends (00-1526 Pet. 25-30) that she was not prosecuted within the five-year statute of limitations period. The court of appeals' (now-vacated) panel opinion rejected that argument, stating that the statute of limitations did not begin to run until March 3, 1993, the day the murder was completed and payment was made. Pet. App. 57-58. That statement, Cisneros argues, conflicts with decisions of the Eighth Circuit, *United States* v. *Delpit*, 94 F.3d 1134, 1149 (1996); *United States* v. *Finley*, 175 F.3d 645, 646 (1999), cert. denied, 528 U.S. 1094 (2000); *United States* v. *Davidson*, 122 F.3d 531, 535, cert. denied, 522 U.S. 1034 (1997). According to Cisneros (00-1526 Pet. 27-28), those cases hold that a violation of Section 1958 is "complete" once an interstate or foreign commerce facility is used with the requisite intent, regardless of when the murder actually takes place.

The claim of conflict is incorrect. Neither *Delpit*, *Finley* nor *Davidson* addresses *statute of limitations* issues. Instead, those cases merely state that the crime of murder for hire is complete upon the use of interstate commerce with the requisite intent, *Delpit*, 94 F.3d at 1149; *Finley*, 175 F.3d at 645, or restate the elements of murder for hire in violation of Section 1958, *Davidson*, 122 F.3d at 535. Moreover, none of those cases addresses whether the offense of murder for hire can be considered a "continuing offense" for statute of limitations purposes where, as here, the participants in the scheme continue to pursue their murder-for-hire goal after the interstate facility is used.[15] As this

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[15] Nor do the district court decisions cited by Cisneros (00-1526 Pet. 28) address that point. *United States* v. *Superson*, No. 95 CR 564, 1997 WL 223072, *1 (N.D. Ill. Apr. 24, 1997), declares that the crime is complete when the elements have all been committed; and *United States* v.

Court has explained, continuing offenses are an exception to the general rule that the statute of limitations begins running once the crime is complete. *Toussie* v. *United States*, 397 U.S. 112, 114 (1970). For continuing offenses, "the statute of limitations does not begin to run when all elements are first present, but rather begins when the offense expires" as through abandonment or completion. *United States* v. *Yashar*, 166 F.3d 873, 875 (7th Cir. 1999). A crime is a continuing offense for statute of limitations purposes when its "language * * * compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115; *United States* v. *Bailey*, 444 U.S. 394, 413 (1980) ("Given the continuing threat to society posed by an escaped prisoner, 'the nature of the crime involved [escape from federal custody, 18 U.S.C. 751(a)] is such that Congress must assuredly have intended that it be treated as a continuing one.'") (quoting *Toussie*, 397 U.S. at 115).

Here, even if the murder-for-hire offense was complete and thus subject to prosecution once the foreign commerce facility was used in 1992, the scheme continued—and the statute of limitations therefore did not begin to run—until Joey Fischer was murdered and the blood-money was paid on March 3, 1993, less than five years before Cisneros's indictment. That Congress intended Section 1958(a) violations to be considered "continuing" until such time as the scheme is completed or otherwise terminated, moreover, is apparent from Section 1958's penalty provisions, which provide enhanced punishment where the murder-for-hire scheme results in personal injury or death.[16] It is unlikely

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Brockdorff, 992 F. Supp. 22, 24 (D.D.C. 1997), merely restates the elements of the crime.

[16] At the time petitioner committed the offense in 1993, the statute provided that anyone who violated its provisions "shall be fined not more

that Congress intended the statute of limitations to begin running before the events necessary to determine punishment had taken place.[17] Indeed, under Cisneros's theory, the statute of limitations would begin running before the goals of her illegal scheme—the murder and payment—were even attempted, and thus before the police and prosecutors would have had any reason to know of the illegal scheme. There is no evidence that Congress intended such a counter-intuitive result. In any event, Cisneros's argument also ignores evidence of international travel, in violation of the statute, that occurred within the 5-year statute of limitations period. See pp. 3-4, *supra*; Pet. App. 7, 18, 34. Although Cisneros challenges the sufficiency of that evidence, that question of sufficiency is fact-bound and does not warrant this Court's review.

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than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both." 18 U.S.C. 1958(a) (1988). In 1994, Congress amended the statute to make murder-for-hire a capital crime if the offense resulted in death. Pub. L. No. 103-322, § 60003(a)(11), 108 Stat. 1969.

[17] For related reasons, one court has suggested that the sentence enhancing factor of death might constitute an element of the offense. See *United States* v. *Smith*, 232 F.3d 650, 652 (8th Cir. 2000). Cisneros, however, raises no claim under *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), and any such error would be harmless beyond a reasonable doubt. It is not and has never been disputed that Joey Fischer was murdered.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

DORA GARCIA CISNEROS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY TO GOVERNMENT'S "STATEMENT"

The Government's "Statement" concerning Cisneros is contained at pages 2 through 8 of its Brief.

First and foremost, the Government has failed to recognize or acknowledge that this was essentially an intrastate scheme where all of the participants lived in Texas and all acts in furtherance of that alleged scheme occurred in Texas. Govt. Brief at 2 to 8. As noted in Cisneros' certiorari petition at page 5, the indictment and bill of particulars only reflect two evidentiary bases to potentially sustain federal jurisdiction: (1) Daniel Garza's four alleged phone calls made from Mexico[1] to Maria Martinez in Brownsville (i.e., Garza's "curandera", the alleged go-between between Garza and Cisneros), all of which occurred on unspecified dates prior to February 14, 1993; and (2) entry by an automobile from Matamoros, Mexico, to Brownsville, Texas, on March 2, 1993.[2]

As to the first potential jurisdictional basis, the Government has been less than precise in its rendition of the facts. First, at page 3 of its Brief, the Government asserts, *sub silentio*, that the conversations between Garza and Martinez which Garza placed from Mexico all occurred after early 1993, a date Martinez told Garza that she no longer wanted Fischer hurt, but killed. In fact, the dates of the four calls from Garza to Martinez from Mexico are absolutely unknown, other than that all of those four alleged calls occurred before Garza found the alleged "hit"

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[1] Garza lived in San Antonio, Texas, 11R1355, 1400, 1419, but had traveled to Mexico to see family members, 11R1402-1403, and harvest land, 11R1422. His travel into and out of Mexico was clearly unrelated to any alleged scheme either to hurt or kill Joey Fischer.

[2] As noted in Cisneros' petition at pages 6 and 15 to 16, the first and second panel opinions addressed the foreign telephone calls and mentioned the vehicle crossing, but avoided resolution of the automobile entry as a "more complicated issues." *See* Pet. App. 18; Pet. App. 50.

men in Dallas on February 14, 1993. As pointed out in Cisneros' petition at page 6, footnote 1, the Government conceded in the Fifth Circuit that all four of Garza's calls from Mexico to Martinez were made prior to February 14, 1993, but otherwise, the dates of the calls were not established. It must be realized that Garza testified that Martinez mentioned having Fischer killed "around the end of January, beginning of February" of 1993, while he was physically present in Martinez's house in Brownsville. 11R1363. Thus, prior to that meeting in Martinez's house in Brownsville, all conversations between Garza and Martinez had focused upon Garza finding someone to beat up or hurt Fischer. Additionally, Garza called Martinez from locations other than in Mexico, and all of the telephone calls (including the four foreign calls) were in late 1992 or early 1993. 11R1364-1366. Garza's lies to Martinez (during these telephone calls) were in reference to "the men, the guys that she wanted to cause harm to this boy." 11R1365. Garza never once testified, contrary to the Government's statement at page 3 of its Brief, that Garza told Martinez that he had found someone to "kill" Fisher, merely to perform some harm to him. 11R1365. Garza made it crystal clear that he had never told anyone to kill the boy, 11R1437-1439, and that this was in fact what he had told the "hit" men in Dallas on February 14, 1993. *Id.* The point is that the Government has incorrectly *assumed* that during at least one of the four calls allegedly placed by Garza to Martinez from Mexico, Martinez asked Garza about a murder for hire, when in truth and in fact, it is totally unclear whether Martinez asked Garza about beating Fisher up or about killing Fisher. This logically follows because it was not until "around the end of January, beginning of February," while Garza was physically present in Martinez's house in Brownsville, that Martinez switched from wanting to hurt the boy to wanting to kill the boy. 11R1363.

As to the second potential jurisdictional basis, the Government's rendition of the facts at pages 3-4 of its Brief also conveniently overlooks the fact that Olivarez and Pizana worked in *Dallas, Texas,* for the Cuellar crime gang

and that the next time *they went to Brownsville from Dallas*, they would perform the job. Additionally, the Government insinuates that after Garza met Olivarez at the La Quinta Inn in Brownsville on the afternoon of March 2, 1993, the car with Mexican license plates crossed into the United States at 6:39 p.m. and that Pizana and Palomares checked into the La Quinta at 8:26 p.m., thus creating the impression that Pizana and Palomares crossed the border in that car. In fact, there is no evidence who was in the vehicle that crossed the border or why it crossed the border. The Government also conveniently ignores the fact that Garza identified two cars at the La Quinta on March 3, 1993, a suburban and a white Ford, and that he expressly testified that he did not know where the operators of those cars had come from. 11R1417.

REPLY TO GOVERNMENT'S "ARGUMENT"

The Government's "Argument" concerning Cisneros is contained at pages 20 to 29 of its Brief.

A. Section 1 Of The Government's "Argument" (Govt. Br. at 21-22)

Cisneros asserted in her petition (at pages 17 to 21) that 18 U.S.C. § 1958 must be interpreted as requiring, if not intent, something more than "but-for causation" and "foreseeability" and that these must be embodied within the jury instructions and sufficiency review to ensure due process under *In re Winship*, 397 U.S. 358 (1970) and *United States v. Gaudlin*, 115 S.Ct. 2310 (1995). Cisneros pointed out that her requested jury instructions, none of which were given, would have ensured that result.

The Government's observation that the court's jury instruction was not objected to (Govt. Br. at 21) ignores Cisneros' proposed jury instructions and the court's observation that "you preserve everything that I did inconsistent with what you favored me with (i.e., inconsistent with

all defensive requested instructions). 11R1520-1521.[3] Accordingly, a plain error review is not appropriate.

Moreover, the Government also ignores the fact that the court failed to limit the jury instructions in accordance with the evidence and the Government's bill of particulars. The bill of particulars, filed voluntarily by the Government without any court order, stated:

> "The evidence in this case will show that, in regards to foreign travel, that Heriberto Pizana and/or other persons unknown travelled from Mexico to Brownsville, Texas, via an international bridge on or about March 2, 1993."
>
> * * *
>
> "The evidence in this case will show, in regards to use of telephone communications facilities in foreign commerce, that Daniel Garza used telephone facilities in San Fernando, Tamaulipas, Mexico, and in Matamoros, Tamaulipas, Mexico, to call Maria Martinez in Brownsville, Texas, from in or about November 1992 to in or about February 1993."

The evidence essentially matched the Government's bill of particulars, although Cisneros disagreed that the evidence was sufficient as to either jurisdictional basis. The court's instruction that "[b]ut the Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce", 11R1516, deviated not only from the evidence, but also from the bill of particulars, a realization totally overlooked by the Government.

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[3] Earlier, the court had stated "[a]nything that I do that is inconsistent with what you have filed of record, you need not object to. You will preserve your exception. So you need not object to anything that you have already favored me with that I do inconsistent with respect to the charge I give to the jury." 11R1495-96. The court reiterated that same message at 11R1499-50.

B. Sections 2 And 3 Of The Government's Argument (Govt. Br. at 22-27)

Sections 2 and 3 of the Government's "Argument" at pages 22 to 27, responds to pages 17 to 25 of Cisneros' petition.

Therein, Cisneros raises, *inter alia*, the propriety of the refusal of her requested jury instructions nos. 12 and 15A, which are quoted in her petition at page 8, footnote 4 and page 11, footnote 7.

These instructions were designed to operate in conjunction with one another and to have the jury instructed on two essential concepts, to wit: that the Government had to prove, and the jury had to find, that the travel or telephone calls were in furtherance of or facilitated the alleged murder for hire scheme (as opposed to the original scheme to beat Fischer, which Garza had testified was only modified in late January or early February 1993), and that the travel or telephone calls were not merely fortuitous, incidental or happenstance (i.e., something more than "but-for causation").

While the Government attempts to minimize the legal significance of Cisneros' challenges on the basis that these requested charges were technically imprecise, it fails to refute the necessity of proof beyond a reasonable doubt and jury instructions on both of these core concepts in a proper prosecution under Section 1958. And, of course, absent an allegation, proof and appropriate jury instructions on both of these concepts, the very essence of due process if violated. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

Indeed, the Fifth Circuit recognized the need for appropriate proof and jury instructions on both of these concepts, but overruled Cisneros' challenges because: (1) the words "in furtherance" should have been "facilitated", ignoring Cisneros' citation of cases which equated the two

terms,[4] Pet. App. 49, 54; (2) Garza's four calls from Mexico to Martinez created a sufficient nexus between the use of the foreign telephone and the alleged murder for hire scheme because "[w]ithout Martinez's incessant reminders during those calls, it is reasonable for a jury to have believed that Garza would not have made as serious an effort to find a hit man," Pet. App. 49; and (3) because Cisneros had confused intent and causation. Pet. App. 56.

As noted above in footnote 4, *supra*, there is no difference between the two – "in furtherance" and "facilitate" – have been used interchangeably in prosecutions under the Travel Act, 18 U.S.C. § 1952, from which the murder for hire statute was formulated. Clearly, the court was on notice of Cisneros' desire to have the jury instructed on the concept and this Court should grant certiorari to clarify that a defendant is entitled to an allegation, proof and an appropriate jury instruction to avoid a violation of the Commerce Clause.

Unfortunately, the jury was not instructed, in any manner, that there were any limitations upon its ability to convict if it found that there was foreign travel or foreign telephone calls. No restriction was put on the jury that such calls had to even be related to the alleged murder for hire scheme, only that "somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce." 1R83, 11R1516, 12R1593-94. The Government fails to address the due process ramifications of this serious omission, and it cannot seriously be argued that fortuitous and incidental travel or telephone calls are constitutionally permissible as a basis for conviction.

While Cisneros may have intermixed causation and intent, her requests were more than sufficiently clear. The

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[4] *See, e.g.*, cases cited at pages 22 to 23 of Cisneros' petition, including *Erlenbaugh v. United States*, 409 U.S. 239, 247 (1972) (furtherance); *Rewis v. United States*, 401 U.S. 808, 813 (1971) (furtherance); *United States v. Houlihan*, 92 F.3d 1271, 1292 (1st Cir.1996) (furtherance).

requested instruction on causation relied upon cases in support of the mail fraud statute and were expressly cited to the court (i.e., *United States v. Sneed*, 63 F.3d 381 at 385 n.4 (5th Cir. 1995), quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)). The jurisdictional basis of the mail fraud statute (i.e., use of the mail) is also included within the jurisdictional bases of the murder for hire statute and consistent with this Court's decision in *Rewis v. United States*, 401 U.S. 808 (1971), where this Court determined that something more than "but-for" causation was required under the Travel Act.

C. Section 4 Of The Government's Argument (Govt. Br. at 27-29)

Regarding section 4 of the Government's "Argument" (pages 27 to 29 of its Brief), the Government opines that there is not a real conflict between the Fifth Circuit's conclusion that, for purposes of the applicable statute of limitations, Section 1958 is a continuing offense and circuit and district court cases cited by Cisneros (all of which expressly state that an offense under Section 1958 is complete upon the use of the interstate commerce facility with the requisite intent). This opinion is advanced by the Government because none of the cases relied upon by Cisneros actually addressed the statute of limitations. While the Government is correct in its observation that none of these cases actually decided a statute of limitations issue, the fact that any number of prior courts have so stated only serves to highlight the need for this Court to define the proper parameters of the statute and thus determine whether the substantive offense of "murder for hire" is a continuing offense or not. Where a promise to pay and an actual payment are both made, and the foreign or interstate commerce nexus is satisfied after the promise but before the payment, does a subsequent payment extend the offense? As argued by Cisneros at page 27 of her petition, the actual "receipt of pecuniary value" only completes the crime when it occurs simultaneously with

satisfaction of the interstate nexus because, neither an actual murder or remuneration are necessary to satisfy the statute. The Government utterly fails to respond to this argument and the fact that the statute does not even require a murder or the payment of renumeration before an offense is committed.

It should also be noted that the Government has totally failed to respond to Cisneros' reliance upon express language contained in the legislative history, which clearly supports Cisneros' position (as well as the statements contained in the cases cited in her petition).

Interestingly, the Government has noted the 1994 amendment to Section 1958. Govt. Brief at page 28, n. 16. As noted by the Government in its footnote, the 1994 amendment added the potential penalty of death. However, the Government has failed to acknowledge that this same amendment also inserted into Section 1958 a prohibition against conspiring to commit "murder for hire." See Pub. L. No. 103-322, § 60003(a)(11), 108 Stat. 1969. This amendment fully supports the original legislative history to the effect that Section 1958 was not intended to be a continuing offense, since it is impossible for only one person to commit the substantive offense of "murder for hire."[5]

The Government appropriately notes that *Toussie v. United States*, 397 U.S. 112 (1970) explained that continuing offenses are an exception to the general rule and that *Toussie, supra* at 115, provides that a crime is a continuing one when "its language *** compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* Cisneros agrees with the Government's

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[5] After all, the offense of causing someone to travel in interstate or foreign commerce or causing someone to use the mail or any facility in interstate or foreign commerce with intent that a murder be committed as consideration for the receipt of or as consideration for a promise or agreement to pay anything of pecuniary value cannot be committed by one person.

rendition of *Toussie*, but disagrees with the application of *Toussie* to Section 1958.

Cisneros asserts that *Toussie* supports her position that Section 1958 is not a continuing offense. This assertion, contained at pages 26 to 30 of her petition, is also buttressed by the realization that the language of Section 1958, as it existed in 1993, clearly compels the conclusion that it was not a continuing offense. The current language also compels that same conclusion.

Additionally, as noted above and fully reflected in her petition at pages 28-29, the legislative history also clearly reflects that Congress did not intend Section 1958 to be a continuing offense.[6] Thus, application of both prongs of *Toussie* support Cisneros' position.

Recourse to the mail fraud statute, 18 U.S.C. § 1341 is instructive, because it has a similar type of jurisdictional nexus (i.e., use of the United States mail). Under Section 1341, the statute of limitations runs from the date of the last mailing in furtherance of the scheme and artifice to defraud. *United States v. Manges*, 110 F.3d 1162, 1169 (5th Cir.), *cert. denied*, 523 U.S. 1106 (1998). As to a conspiracy to commit mail fraud, a continuing offense, the statute of limitations runs from the date of the last overt act in furtherance of the conspiracy committed by any co-conspirator. *See Grunewald v. United States*, 353 U.S. 391, 396-97 (1957). A scheme to commit a "murder for hire" is no more a continuing offense than a scheme and artifice to defraud. Accordingly, Section 1958 is not a continuing offense and this Court should grant certiorari to resolve this issue.

Finally, the Government's suggestion that the evidence of international travel within the five year statute of

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[6] It is noteworthy that the Government cites only one statute which has been declared to be "continuing" under *Toussie*, to wit: 18 U.S.C. § 751(a), and does not list all of the statutes which are arguably "continuing." At page 29, note 15, Cisneros cited a leading commentator who opined that a large number of offenses were continuing ones, but that list did not include Section 1958.

limitations renders Cisneros' issue unworthy of certiorari review ignores two significant factual matters. First, both panel opinions expressly declined the opportunity to address the international travel as it was a "more complicated issue" (although the *en banc* opinion factually recited that the "hit" men came from Mexico, a clearly erroneous interpretation of the facts). Second, the jury's note at 1:45 p.m. during its deliberations asking whether it had to find both foreign telephone calls and foreign travel, or whether it could find just one or the other, 2R75, 12R1602-1609, clearly reflects the realization that the jury was unable to find both foreign telephone calls and foreign travel. In fact, the court's response to that note at 2:12 p.m., informing the jury it only had to find one or the other, not both, was given to the jury a mere 23 minutes before the jury announced at 2:35 p.m. that it had reached a verdict. 2R73. Finally, it should be noted that if this Court were to grant certiorari and interpret Section 1958 in a manner consistent with Cisneros' position, the Government would still be allowed to retry Cisneros based upon the alleged international travel on the evening of March 2, 1993. This conclusion follows because no court has ever declared the evidence insufficient as to that second potential jurisdictional basis, and therefore there would not be any double jeopardy bar to a retrial relying upon this potential jurisdictional basis.

CONCLUSION

Cisneros' petition affords this Court with an excellent opportunity to provide guidance to the lower courts regarding the proper interpretation of the "murder for hire statute", 18 U.S.C. § 1958. Meritorious and important questions regarding the jurisdictional nexus, causation, jury instructions and the statute of limitations are presented by Cisneros' petition. Certiorari should be granted.

Respectfully submitted,

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